

**The South African Child Justice Bill:
An investigation into diversion
processes for children**

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ABSTRACT

The South African Child Justice Bill creates a new stage in legal proceedings, known as the preliminary inquiry, to determine whether children who offend should be diverted or prosecuted. This process provides greater discretion than under previous legislation to criminal justice professionals. The Child Justice Bill has been drafted but not yet enacted. This research investigates the way in which the Bill's proposals appear likely to affect the process of diversion from prosecution for children. This question is answered in two ways: through a review of literature, and through fieldwork to investigate how discretion is being exercised by criminal justice professionals with regard to the disposal and treatment of child offenders.

The research will provide insight into the decision-making that affects the process of diversion in child justice in South Africa. The Bill, when enacted, will provide for a new child justice regime that will meet South Africa's international obligations and will address some of the criticisms that have been made about how child offenders are treated.

This thesis makes a contribution to the developing knowledge about the South African child justice regime at a crucial time in the development of new legislation. It is original in its methods, particularly in gathering information from both child justice practitioners and the reformers who have driven the Bill. It is also original in its conclusions. The thesis argues that, although the Bill will significantly improve the treatment of many children in the child justice system in South Africa, there may be large numbers of children excluded from the new regime. These children will be those who are persistent offenders, who are likely to be excluded by practice, and children who have committed serious offences, who are likely to be excluded by statute. It is argued that a greater understanding of the risk principle would allow a justification to be made to work with high-risk and serious offenders in the community.

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INTRODUCTION AND FRAMEWORK FOR RESEARCH

Research Question

The South African Child Justice Bill (Bill 49 of 2002) creates a new stage in legal proceedings, known as the preliminary inquiry, to determine whether children who offend should be diverted or prosecuted. This process provides greater discretion to criminal justice professionals than under previous legislation. The Child Justice Bill has been drafted but not yet enacted. This research investigates the way in which the Bill's proposals appear likely to affect the process of diversion from prosecution for children. This question is answered in two ways: through a literature review and through fieldwork.

Introduction

The research will provide insight into the decision-making that affects the process of diversion in child justice in South Africa. The Child Justice Bill (hereinafter referred to as 'the Bill'), when enacted, will provide for a new child justice regime in South Africa. This will meet the country's obligations under the United Nations Convention on the Rights of the Child (1989) (hereinafter referred to as the UNCRC) and will address some of the criticisms that have been made internally and externally about how child offenders are treated in South Africa.

The Preliminary Inquiry is at the centre of the new regime. It is envisaged that many children will be diverted away from court proceedings at this stage and undergo a therapeutic programme, a restorative justice intervention or another form of diversion rather than being prosecuted. This option, it is anticipated, will not be reserved for minor, first-time offenders; rather a range of diversion options has been created to allow diversion for serious and persistent offenders.

Prosecutors, magistrates and probation officers are given considerable discretion at the preliminary inquiry stage. This investigation is into how they will exercise that discretion with regard to the decision whether or not to divert children, and whether the aims of the reformers who have advocated for the Bill, and the legislators, will be met. Much has been written about the Child Justice Bill but little consideration has been given to the issue of how the Bill will be implemented by criminal justice practitioners. The relationship between policy and practice is crucial in determining whether the objectives of policy will be achieved (May, 1991; Kemp & Gelsthorpe, 2003).

This research makes a contribution to answering a question posed by the Child Justice Alliance (a coalition formed to advocate for the Bill, described later in the thesis) in relation to the Bill (Koch and Wood (2001: 15). The authors question how much of the Child Justice Bill will depend on the style of interpretation and discretion of its users. The data gathered provides insight into the exercise of discretion by role players at the preliminary inquiry stage of the process. The analysis considers whether the aim of the new legislation, to divert children away from the criminal justice system, is likely to be achieved.

The campaign to have the Bill introduced, the advocacy on its behalf and the training that was given regarding new diversion disposals have all had a major influence on child justice in South Africa from 1995 – 2005, regardless of when the Bill is finally enacted. This thesis examines child justice practice in anticipation of the introduction of the Bill but also provides insight into practice during the transitional period when practitioners were preparing to accept a new regime based on children's rights, but had not yet received all the necessary resources and training, and were awaiting the introduction of legislation. The Bill is currently (in February 2005) before the Department of Justice Portfolio Committee and this research also considers what the final child justice regime will look like when Parliament has finished its work and the Bill is enacted and implemented.

Outline of the Literature Review

The literature review sets the foundation for the presentation and analysis of the data. It consists of two sections:

- The context section sets out the child justice context in South Africa, in particular focusing on the origins, content and campaign to implement the Child Justice Bill. Some consideration is given to the recent developments regarding the Bill, especially the scrutiny of the Department of Justice Portfolio Committee. As part of this description of the child justice context, a number of significant child justice projects are outlined.
- Ideological influences on the Bill are critically analysed in the second section: discretion, children's rights, diversion, rehabilitation, restorative justice and managerialism. The theory related to the diversion and treatment of children who commit sexual offences is also considered in this section, as that is relevant both to the implementation of the Bill and to this research. The final part of this section considers discourses that have been largely or completely absent from discussions regarding the Bill. Discourses considered relate to risk and effective practice, as these provide particular insight into how the Bill could operate, and are drawn on in the conclusion to the thesis.

Outline of the Fieldwork

Research Methods

This research investigates the way in which the Bill's proposals appear likely to affect the process of diversion from prosecution for children. The important stage in diversion from prosecution under the Bill will be the preliminary inquiry and data was gathered from the three professions that will take part in this process: probation officers, prosecutors and magistrates. In addition data was gathered from campaigners for child

justice reform. The investigations were centred in two South African areas: the Eastern Cape and the Western Cape, emphasising Cape Town. These areas were chosen because of the differences between them; Eastern Cape is a mainly rural area and one of South Africa's most disadvantaged provinces, Cape Town is the major city in the Western Cape, and one of South Africa's most affluent cities.

As the Bill has not yet been enacted and it was not possible to observe the actual preliminary inquiry process, the main framework for data collection was the use of case vignettes. Interviewees were provided with fictional cases of child offenders and asked to discuss how decisions would be made in such a case. They were then asked to describe the decision that they would make and the basis on which they would make it. Postal questionnaires were the main method used but a number of the professionals were also interviewed to provide richer and more detailed data.

Information was gathered from the three groups of professionals who will be involved in the preliminary inquiry and the decision to divert under the Bill. Probation officers are given wide powers under the Child Justice Bill and they will write assessment reports on child offenders in the 48 hours between arrest and preliminary enquiry. Their recommendation will often determine whether a child is diverted or proceeds to a full court hearing. Prosecutors will receive the probation officer's report and submit it to the court. In most cases the prosecutor will be the key role player in the decision whether to divert or to proceed to trial. They may also make an independent decision to divert the child either before the preliminary inquiry or between the preliminary inquiry and the full trial. Prior to the implementation of the Bill the prosecutor plays the most significant role in the decision whether or not to divert a child offender. The magistrate is given power to influence whether a child who is facing a preliminary inquiry will be diverted or will proceed to trial. Under existing legislation the magistrate plays no part in the decision whether or not to divert a child; under the new legislation he or she will be granted considerably greater influence in this part of the process.

Each of these three role players will have significant influence over the future of the child and each has a varying degree of power to exercise his or her discretion

independently. They will answer to professional guidelines and codes of ethics but the confidential nature of child court proceedings will result in decisions not being open to public scrutiny. Although the provision of preliminary inquiries could provide great benefits for children, the increase in the opportunity for the use of professional discretion could lead to arbitrary or prejudiced decision making and has the potential to increase the regional disparities in how children are dealt with by the courts.

In addition to these three groups of professionals, interviews were also carried out with a small group of influential child justice reformers who had been involved in drafting the Bill and campaigning for child justice reform. This provides valuable insight into the original intentions surrounding the Bill's implementation.

The methods used for this research are outlined in detail in chapter three of the thesis. The methods used to gather data are justified, the choice of research subjects is described, the methods used to analyse data are outlined and there is a discussion of the research ethics.

Presentation, Analysis and Conclusions

The data is presented in chapter four of the thesis, following the structure of the questionnaire. It is then analysed thematically in chapter five; the themes used link in with the literature reviewed in Chapter Two. The final chapter, the conclusion, draws the thesis together, making further links between the data and the literature in order to answer the research question.

LITERATURE REVIEW

The Literature Review is in two parts. The first sets the context for the research. The second considers the theoretical basis of the Bill, particularly in light of the research question surrounding diversion processes. It includes a consideration of discourses that have been absent, or hidden, in the discussions regarding the development of the Bill.

RESEARCH CONTEXT: THE CHILD JUSTICE BILL

Part one of this chapter will introduce the context of the research in five sections, centring on the 2002 draft of the Child Justice Bill. The first section provides a brief introduction into the political context in South Africa. The second section describes the development of the Bill and the campaign to have it implemented. The third section summarises the content of the Bill, focussing on the aspects that are of particular relevance for this research. The fourth section outlines what has happened since the acceptance of the Bill by the South African cabinet in 2001. In the fifth and final section of part one of this chapter some of the child justice projects that have been developed are introduced.

Some of the ideological influences on the Bill are touched upon through this description and considered in detail in the subsequent parts of the literature review.

South African Politics and Recent History

It is clearly not possible to do justice to the whole of South African history in a few short paragraphs, so this section will concentrate on the aspects of the changes in the last decade that have most relevance for the present research. These consist of the political context, the Constitution and the Truth and Reconciliation Commission (TRC).

The recent political development of South Africa has been dominated by the fall of apartheid and the introduction of a new, democratic government. Apartheid, a policy of

racial segregation and 'separate development' was introduced in 1948 and over five decades black people in South Africa were subjected to systematic discrimination in every sphere (Reader, 1998; Burger, 2003). Throughout the entire period of apartheid the discriminatory policies were opposed by a resistance movement, led by the African National Congress (ANC). This national and international campaign culminated in eventual success in the 1990s with the release of Nelson Mandela, the unbanning of the ANC, and the first democratic elections in 1994 (Burger, 2003). Apartheid's social policies generated violence and other crime, having a massive effect both on crime levels and the criminal justice system (Brewer, 1994b; Shaw, 2002). Children in particular suffered violence, abuse and other trauma as a consequence of apartheid (Rock, 1997; Wedge et al., 2000). That effect is still evident today since much of the inequality established under apartheid still prevails (Shaw, 2002).

The ANC emerged from the 1994 election with 63% of the vote (Stober and Ludman, 2004). It has increased its majority in the two subsequent elections winning 66% of the vote in 1999 and 70% in 2004 (Stober and Ludman, 2004). The ANC-led government has been endeavouring to reconstruct the country but the needs are so great and so varied that it has been a slow and sometimes frustrating process. As well as the criminal justice system, the government has had to give attention to economic empowerment, housing, education and health, including the impact of HIV/ AIDS (Burger, 2003). South Africa continues to be characterised by huge economic disparities; Human Rights Watch estimates that 22 million people (of a population of 45 million) live in extreme poverty (Human Rights Watch, 2005).

The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) took effect on 4 February 1997. The Constitution sets the supreme law of the land and South Africa's constitution is now acclaimed as one of the most progressive in the world (Burger, 2003). Its stated aims include the establishment of a society based on democratic values, social justice and human rights and the healing of the divisions of the past (Burger, 2003). The specific constitutional provisions relating to children who offend are outlined later in this chapter.

As a means to heal the wounds of apartheid and to instigate a commitment to accountability in South African public life, the government set up a Truth and Reconciliation Commission under the leadership of Archbishop Desmond Tutu (Asmal *et al.*, 1997; Tutu, 1999a; Boraine, 2000). The Commission reported in 2003, and its report was accepted by Government and Parliament (Burger, 2003). Although by no means universally accepted as an unqualified success (Bell, 2001; Simpson, 2004) the TRC contributed to South Africa's relatively peaceful transition to a democracy and its perceived accomplishment has influenced the attitude to restorative justice in South Africa's criminal justice system, including the child justice system (Skelton, 2002b).

South Africa since 1990 has been a country in transition. The relationship between crime and that transition is a complex one (Dixon, 2002, 2004) but it is clear that the criminal justice system has been affected in the need to devise new laws, create new institutions and respond to the requirements of the Constitution. The next section will outline how the child justice system developed through that period.

Development of the Child Justice Bill

South Africa is going through a fast and wide-ranging social transition, and child justice legislation is just one of the aspects of social policy affected by this. The journey that it is making 'from rhetoric to reconstruction' (Brewer, 1994a:3) incorporates the field of child justice. The country is striving to balance its aspirations to create a fair and just society with its capacity to achieve those aspirations.

To set the context for the Bill it is therefore necessary to consider the existing legislation and the development of the Bill.

Legislation prior to the Child Justice Bill

There is currently no specific legislation relating to child offenders in South Africa. Those dealing with children in conflict with the law need to peruse the Criminal Procedure Act 1977, the Correctional Services Act 1959, the Child Care Act 1983 and

the Probation Services Act 1991 to find the sections which deal with child offenders (Terblanche, 1999).

Not only are there various pieces of legislation, they also reflect a variety of different sentencing and political philosophies (Koch and Wood, 2001). The national situation lacks coherence, clarity and consistency and is confused further by the implications of international instruments, such as The United Nations (UN) Standard Minimum Rules for the Administration of Juvenile Justice [Beijing Rules] (UN, 1985) and the UN Convention on the Rights of the Child [UNCRC] (UN, 1989), which are based on entirely different philosophies than the South African legislation. Further confusion surrounds the role of the South African Constitution, which supersedes primary legislation. The Constitution provides special rights to children, but until the Bill is introduced there exists no South African child justice legislation that has been written with these rights in mind.

Essentially child offenders in South Africa are dealt with by the same criminal justice system as adults, with a few special provisions (Terblanche, 1999). For example the provision that the court may stop the trial of a child and remit the defendant to a Children's Court, allowing the child to be dealt with outside the criminal justice system is contained in the Criminal Procedure Act 1977 s254. The options for dealing with convicted children are contained in Section 290 of the Criminal Procedure Act 1977. These options include placing the child under the care of a probation officer, correctional official or another suitable person, or committing the child to a reform school (Terblanche, 1999). Many child offenders are sent to prison, either on remand or after sentence (Department of Justice, 2004a; Fagan, 2004).

Development and Progression of the Child Justice Bill

The Constitution

Although the ascendancy of the children's rights approach can be traced back to before the first democratic elections (Pinnock *et al.*, 1994; Skelton, 1999; Van der Spuy *et al.*, 2004) the campaign to develop and implement child justice legislation in the new South Africa took its impetus from the enshrining of children's rights in the South African Constitution (Act 108 of 1996). The Constitution provides special rights to children and child justice legislation, both new and existing, must be interpreted in light of the constitutional requirements (Singh, 1995; Sloth-Nielsen, 1996a).

Section 28 of the Constitution provides for children's rights, and the general principle that a child's best interest is of paramount importance in every matter concerning a child is stated in s28 (2). Section 28 (1) deals specifically with children and provides that children should only be detained as a matter of last resort, for the shortest possible time period and kept separately from adults.

The advocates of a children's rights approach to child justice within South Africa saw the incorporation of s28 into the Constitution as a major victory for their campaign (Sloth-Nielsen, 1996a; Skelton, 1998). However, as described below, both sentenced and unsentenced children continue to be incarcerated in adult prisons and other residential facilities (Sloth-Nielsen and Muntingh, 2001; Fagan, 2004). This can be put in a general context of the government seeking to implement the harshest possible criminal justice regime that can be permitted under the constitution (Van Zyl Smit, 2001).

International Law

As well as its own constitution, South Africa is also committed to international instruments that enshrined the rights of children. South Africa ratified the UN CRC

(UN, 1989) in 1995. This Convention deals with a broad range of children's rights and provides a framework within which the issue of child justice must be understood (Hammarberg, 1994; UNICEF, 1998; Sloth-Nielsen, 2004a). By ratifying the Convention, South Africa is now obliged, in terms of article 40(3), to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. The UN CRC is a binding instrument and the South African Law Commission [SALC] (SALC, 1996) lists other international instruments that have a bearing on children in conflict with the law in South Africa. These instruments include the UN Guidelines for the Prevention of Juvenile Delinquency [Riyadh Guidelines] (UN, 1990a), the UN Rules for the Protection of Juveniles Deprived of their Liberty (UN, 1990b) and the Beijing Rules (UN, 1985). One of the aspects of the Beijing Rules that has been enthusiastically accepted in South Africa is the emphasis on diversion from criminal justice processing as the central principle of any future child justice system.

The African Charter on the Rights and Welfare of the Child [African Children's Charter] (Organisation of African Unity [OAU], 1990) also deals with the Administration of Juvenile Justice in Article 17. The African Children's Charter does not differ substantively from the UN Charter but is sometimes preferred in South Africa because its more collective rather than individualistic focus fits in more closely with perceived African traditions of the interdependence of communities (Skelton, 1998; Viljoen, 2000; Gose, 2002). The African Children's Charter takes a more collective approach to rights blending the rights of children with the rights of family and community.

The international instruments influenced the Law Commission in its drafting of the Bill. There is recognition both inside and outside South Africa that neither the obligations under international law nor the terms of the Constitution are being complied with (Community Law Centre [CLC], 1998; Kiessl, 2001; Fagan, 2004; McClain-Nhlapo, 2004; Human Rights Watch 2005). The introduction of the Child Justice Bill is expected to address these shortcomings.

Development of Child Justice in Africa

It is illustrative to consider the development of child justice legislation in other African countries, particularly in light of the requirements of international instruments. Many other African countries are undergoing the same process as South Africa; the UN CRC (UN, 1989) has provided the climate for a widespread re-examination of law relating to children. All African states except Somalia, which remains a signatory, have ratified the UN CRC (Sloth-Nielsen and Van Heerden, 1997; Godfrey, 2004).

Sloth-Nielsen and Van Heerden (1997) identify four common themes evident in African reform initiatives: all legislation starts with a statement of rights and principles; there is an emphasis on social support; empowerment is a key principle and all African legislation is enacted in a similar context.

Lessons from other African countries are useful in understanding the design and implementation of child justice legislation in South Africa. The socio-legal context is similar across African countries. They all had to repeal legislation inherited from former regimes and they all used the principles of the UN CRC and the concept of children's rights to inform the design of new legislation. The drafters of child law in African countries have always shown an awareness that the law will not operate in isolation (Sloth-Nielsen and Van Heerden, 1997). In many people's lives codified law will play a much less important role than customary practices, religious legal systems and other systems of personal law. This will inevitably result in the law not having uniform and universal applicability.

Another common theme in developing new child justice regimes in African countries is the introduction of diversion schemes. In addition to South Africa, countries that have introduced diversion schemes include Uganda, Namibia and Malawi (Parry-Williams, 1993; Penal Reform International, 2000a, 2000b, 2000c; Jacobs-du Preez, 2002).

Significant Events in the public debate on child justice

The emphasis on children's rights will be considered in greater detail later in the literature review. At this stage the main events of the 1990s in this regard will be discussed to aid the contextualisation of the development of the Bill. As well as the development of the Bill the significant legal developments in the 1990s have included the adoption of the Constitution, the ratification of the UN CRC (UN, 1989) and the decision in *S. vs. Williams and others* [1995] (Skelton, 1998) that whipping as a sentence was unconstitutional. The public debate on children's rights and the legal system has been informed by two significant high-profile events in the 1990s.

The first of these events was the death of 13-year-old Neville Snyman in custody in September 1992 (Skelton, 1998). He was murdered by his cellmates, older teenagers, while awaiting trial for the theft of sweets and drinks from a shop. His death led to the report by child justice non-governmental organisations (NGOs) calling for a child justice system to be created that centred on the rights of children. The government responded positively to this and set up a working group to consider alternatives to custody for children. This process eventually led to the incorporation of a provision enshrining children's rights (section 28) into the Constitution and the drafting of the Child Justice Bill.

The second incident was the premature release of hundreds of children in 1994. This followed an amendment made to the Correctional Services Act (Act 17 of 1994) preventing the detention of children for longer than 24 hours, or 48 hours for children charged with serious offences (Sloth-Nielsen, 1996b). Children awaiting trial were to be sent home or to Places of Safety. This was intended to be introduced piecemeal, region-by-region but due to a legislative error it was introduced at once, across the whole country. The result of this was "pandemonium" (Skelton, 1998:6) with children absconding from places of safety all over the country, many not returning to stand trial. The infrastructure to support the new legislation was not in place; Places of Safety, even where they existed, were inadequate for dealing with children needing such a high degree of supervision (Sloth-Nielsen, 1996b; Skelton, 1998). Emergency legislation

was introduced to deal with the crisis, allowing children awaiting trial to be detained in prison. This was intended to be temporary legislation, but many children are still remanded in custody today (Skelton, 1998; Fagan, 2004; Human Rights Watch, 2005). At the end of May 2004, 1857 children were remanded in custody in South Africa (Department of Justice, 2004a). The youngest of these were four children aged 7 – 13, detained in KwaZuluNatal province (Department of Justice, 2004a).

The writing of draft legislation

The first draft of the Child Justice Bill (SALC, 2000b), released by the South African Law Commission on 8 August 2000, came at the end of a lengthy period of consultation. The process commenced with the appointment by the Minister of Justice in 1996 of the Juvenile Justice Project Committee (Sloth-Nielsen, 1999a). The impetus for the appointment of the committee came from the enshrining of children's rights in the South African Constitution and the ratification by South Africa in 1995 of the UN CRC. The Project Committee was made up of individuals and organisations that had been prominent in earlier advocacy campaigns (Sloth-Nielsen, 1999a). This is in keeping with other developments within transitional South Africa where prominent members of civic society and the leadership of NGOs were given roles by government (Burton, 1998). The Project Committee released an issue paper in May 1997 (SALC, 1996); this was debated at an international conference, and then converted into a discussion paper (SALC, 1998).

The discussion paper was released in December 1998 and was subjected to intensive public consultation. This consultation included focus groups, written submissions and a project to elicit the views of children (Ehlers, 2002; Kassan, 2004). The consultation with children was in line with the requirements of the UN CRC and part of an international trend to take children's perspectives more into account when making policy decisions that affect them (McKechnie, 2002). This research found that children were keen that diversion be used more frequently and that they welcomed the introduction of the preliminary inquiry (CLC, 1999; Ehlers, 1999, 2002).

The final report containing the Bill (SALC, 2000b) was then handed over to the Minister of Justice in July 2000. The University of Cape Town also produced a research monograph detailing the cost implications of the Bill, highlighting that it could be introduced without overall cost to the state (Barberton, 2000).

In 2000 the South African government and the United Nations entered into an agreement regarding technical assistance, which gave rise to the Child Justice Project (Skelton, 2000). The objective of the project was to support the implementation of child justice legislation. The assistance included providing for the development of diversion programmes and assisting government in the drafting of regulations (Skelton, 2000).

Since 2000, the Bill has progressed towards enactment, but extremely slowly. It was approved by Cabinet in 2001 and was then passed on to the Department of Justice and Constitutional Affairs Portfolio Committee. Developments since then are described later in this chapter.

Pressure to Implement the Bill

The main campaign to implement the Bill has been led by the Child Justice Alliance, which was established in 2001. The Alliance is made up of individuals and organisations working in the field of child justice. Its purpose is to ensure that the Bill is passed by Parliament, through making information available to government and civil society (Skelton, 2004). The Alliance disseminates information to child justice researchers and practitioners (Child Justice Alliance, 2001) and made a detailed submission to the Department of Justice and Constitutional Development Portfolio Committee about the content of the Bill (Child Justice Alliance, 2003; Parliamentary Monitoring Group [PMG], 2003e). The Alliance follows in a tradition of child justice changes in South Africa being advocated for by a small group of committed reformers (Van der Spuy *et al.*, 2004; Van Zyl Smit and Van Der Spuy, 2004). Information was

gathered from a selection of these reformers as part of this research, and this process is described in Chapter Three.

In the absence of the implementation of the Bill, the South African child justice system is regularly criticised both within South Africa and by international monitoring bodies (Kiessl, 2001; Fagan, 2004; McClain-Nhlapo, 2004; Human Rights Watch 2005). There is significant pressure from both national and international human rights groups to introduce reforming legislation in line with the South African Constitution and South Africa's obligations under international law. In January 2000 the UN Committee on the Rights of the Child expressed concern about a number of areas in South Africa, including the child justice system, in particular the holding of children in adult detention centres (Sewpaul, 2000). More recent figures show that the situation has not changed. At the end of May 2004 there were 3594 children under 18 in South African prisons; 1857 of those were unsentenced; 1737 were sentenced (Department of Justice, 2004a). Human Rights Watch, in its 2005 World Report (Human Rights Watch, 2005), puts the number of children in detention awaiting trial at more than two thousand.

The criticisms of the South African child justice regime continued in 2004, despite an interim protocol that was intended to reduce the use of custody for children prior to the enactment of the Bill (Gallinetti, 2001b), and efforts that have been made to improve the existing system (Sloth-Nielsen, 2004b). Resources for the assessment, diversion and management of child offenders are not available in all areas (Steyn and Foster, 2001). Judge Fagan, the inspecting judge of prisons, stated that the combination of overcrowding in prison and the inappropriate imprisonment of children has meant that many children are detained in horrible conditions (Fagan, 2004). Judge Fagan found that the majority of the approximately 4000 children either sentenced or awaiting trial are held in prisons. South African prisons are generally overcrowded (Van Zyl Smit, 2004) and all imprisoned children are held in overcrowded conditions. Children in prison may be assaulted by staff members or other inmates (Kiessl and Wurger, 2002). The worst overcrowding exists in Pollsmoor Prison, near Cape Town where 2090 children are held in cells with capacity for 1111 (Fagan, 2004). Judge Fagan (2004:2) described the situation:

Conditions are terrible in many of the prisons where children are held. In April last year in Johannesburg Medium A Prison, in cells supposed to hold 38 prisoners there were 101 juveniles. There are about three or four such cells, each with one toilet only. By 10:00am there is no water to flush the toilet or to use for drinking. While conditions may vary, many children are subjected to gangs, are sodomised, become infected with HIV/ AIDS, suffer from scabies, and have no access to education or rehabilitation.

The South African Human Rights Commission (HRC) (McClain-Nhlapo, 2004) added its voice to the criticisms in its submission to the Parliamentary Portfolio Committee on Correctional Services in 2004 (PMG, 2004f). One of the examples it cited was of a girl charged in a hijacking case, being remanded in custody awaiting trial for four years (McClain-Nhlapo, 2004).

At every stage of the development of the Bill there has been optimism amongst child justice professionals and other supporters that it would soon be enacted. A publication on behalf of Lawyers for Human Rights predicted the enactment of new legislation in 1999 (Skelton, 1998) but the optimism for an early enactment mainly followed the first publication of the full Bill in 2000. There was a sustained campaign of promotion and training for the implementation of the Bill at that time and organisations such as The National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) and The South African Young Sex Offenders Project (SAYStOP) developed programmes in line with the new regime.

The next section of this chapter outlines the content of the Bill.

Content of the Child Justice Bill

The main provisions of the Bill that are relevant to this thesis are summarised below. Particular attention is paid to the proposed diversion regime, as the focus of the research. The Bill makes a number of other provisions, with regard to police powers, legal representation, review of sentencing, monitoring and records of conviction. All references to the Bill relate to the 2002 draft tabled before the Portfolio Committee at

the start of 2003. At the time of writing (February 2005) this remains the most up-to-date published draft. Chapter Three will refer to the relevant instances where the Bill has been changed subsequent to the fieldwork being carried out.

Objectives and Principles

The first chapter of the Bill contains the objectives of the Bill and principles on which it is based. This is a standard practice in African countries which have recently introduced child justice legislation and is in line with all the international instruments that advocate that child justice legislation should begin with a statement of principles. The objectives of the Bill are to protect the rights of children, promote *ubuntu* and promote cooperation between government departments and other agencies (sections (2) – (3)). *Ubuntu* is an African view of the world that is both a guide for behaviour and a philosophical position. It can best be described as the concept that ‘a person is a person through other people’ (Tutu, 1999a; Mbambo and Skelton, 2003). The concept of *ubuntu* is further defined in the glossary.

The objectives and principles were reconsidered by the Department of Justice Portfolio Committee, and it is not clear whether they will remain in the eventual Act (PMG, 2003h).

Age, Criminal Capacity and Age Determination

This is outlined in Chapter Two of the Bill. Under the existing South African law there are provisions that relate to children under the age of 18 and others that relate to young people under the age of 21. Under international law the upper age limit for a child is 18 (UN CRC), and the South African Constitution defines a child as under the age of 18 (section 28(3)).

In relation to the age of criminal capacity, the pre-Bill position in South Africa is determined by common law in that a child under seven years old is irrebuttably

presumed to lack criminal capacity; a child above seven but below fourteen years is rebuttably presumed to lack criminal capacity; and over fourteen years old the child is regarded as having full criminal capacity.

The Child Justice Bill provides that the statutory minimum age for criminal capacity should be 10 years old and children aged 10 to 13 should be rebuttably presumed not to have criminal capacity. Only if children aged under 13 show an ability to distinguish between right and wrong and to act accordingly will they be allowed to stand trial. Children aged 14 to 18 should be tried by the Children's Court.

Detention of Children and Release from Detention

The provisions for the detention of children are determined by the principles set out in the Constitution, section 28 (1) (g). These are as follows:

“Last resort” principle

A child who is not yet released from custody should be so released. The presiding officer should only consider other placement options if an enquiry is made and the conclusion arrived at that the child cannot be released.

Detention in prison is only considered if the child cannot be placed in secure care or a place of safety.

“Shortest time period” principle

When a child is detained it must be for the shortest possible time. The trial must be finalised within 6 months or else the child should be released unless charged with murder, rape or aggravated robbery. All trials of accused children should be concluded as speedily as possible.

Child Justice Court

The Bill, in Chapter Seven, provides for the creation of a specialised court at district court level, called the Child Justice Court and staffed by specially trained personnel. There is a presumption that adults and children will be tried separately and at any other court hearing the case must apply child justice legislation.

The Bill provides for the creation of ‘One Stop Youth Justice Centres’. According to Chapter Seven of the Bill the One Stop Centres will include offices for the police and probation services, holding cells for children and a Child Justice Court. There are currently three of these centres in existence, the first of which, ‘Stepping Stones’, was set up at Port Elizabeth in the Eastern Cape. ‘Stepping Stones’ will be described in detail later in this chapter.

Sentencing

Chapter 8 of the Bill prohibits life imprisonment for offenders under 18 years old. It allows diversion options to be used as sentences and allows postponed or suspended sentences, or correctional supervision. It allows residential sentences to be imposed only when justified by the seriousness of the offence and states that for prison to be imposed there must be substantial and compelling reason for such a sentence. A probation officer’s report must be provided except where the case is very minor.

There will be significant resource and training implications to these changes, and findings regarding the state of readiness of the relevant staff and organisations will be discussed in a later chapter. Ncube (2002), as part of his research into another subject, found that there was a considerable degree of ignorance about the new Child Justice Bill among youth justice professionals.

Assessment, Diversion and the Preliminary Inquiry

The UN CRC enshrines the desirability of diversion from the criminal justice system, but until the enactment of the Bill the South African system did not provide for statutory diversion. Diversion processes were established through case law (Sloth-Nielsen, 2000; Muntingh, 2001b; Wood, 2003). Notwithstanding this there are South African projects which divert children away from the criminal justice system at a pre-trial stage; some of these projects are outlined later in this chapter.

The Child Justice Bill introduces a new diversion regime in that it creates distinct procedures for diversion, provides innovative diversion options, creates statutory procedures for restorative justice and protects the human rights of children. The Bill itself does not define diversion, although Muntingh and Shapiro (1997:7) provide a definition of diversion as:

The channelling of prima facie cases from the formal criminal justice system on certain conditions to extra judicial programmes.

Assessment

Assessment of children in trouble with the law is required by chapter four of the Bill. The assessment will be undertaken by a probation officer who is accorded wide powers. The report is compiled and submitted to the prosecutor containing recommendations on the child's release or detention and whether the matter should be diverted or should go to the Children's Court. The report is considered at the preliminary inquiry and all present should be informed of its contents.

The Preliminary Inquiry

The preliminary inquiry is described in Chapter Five of the Bill and will provide a systematic approach to procedure in child cases, sifting the serious from the minor and the divertible from the proceeding. A preliminary inquiry is compulsory for every child. It will provide for the participation of families and it is anticipated that it will increase the likelihood of diversion. The system allows the magistrate to play a more inquisitorial role.

The Purpose of Diversion in the Child Justice Bill

Diversion is outlined in Chapter Six of the Bill and the purposes of diversion are defined in section 48. The purposes of diversion include meeting the child's needs, promoting reintegration to the family and the prevention of the child receiving a criminal record. The Bill states that promoting reconciliation with the victim and the community are also purposes of diversion.

The Bill contains rules about the referral of children to diversion, to ensure their rights are protected and they are not coerced into diversion. Section 51 states that a child can only be considered for diversion if he or she acknowledges the offence and consents to diversion. The Bill also sets out minimum standards for diversion at section 49, including that children should not be excluded from programmes that charge a fee because of their inability to pay, and that diversion options must be constructive and promote the child's well-being.

The Bill provides that diversion programmes must be registered in terms of regulations to the Act. The regulations will spell out diversion standards more than the legislation does. A process of registration will set minimum standards, but it has been argued that there is a danger that it may also hamper creativity, and lead to too much state control (Gallinetti, 2003b).

Professional Roles

There are three main groups of professionals who are involved in the decision as to whether to divert a child from the criminal justice system at the preliminary inquiry stage:

The Prosecutor

Prior to the introduction of the Bill, the central figure in the decision to divert is the prosecutor. Prosecutors are, and will remain, central to the criminal justice system in South Africa; they decide which cases to prosecute or decline. Their role is equally important when it comes to diversion; the final decision about whether to prosecute or divert lies with the prosecutor.

Prior to the Bill, prosecutors had been autonomously implementing diversion for many years, but selectively and disjointedly (Muntingh, 1998; Mukwevho, 2001). As a step towards addressing this disjointed approach, the office of the National Director of Public Prosecutions issued policy directives regarding diversion. The implementation of these directives increased the number of diverted cases but did not entirely eliminate the problems. An audit into diversion practices found massive regional variations; only 100 of the 500 courts practised diversion and these courts were mainly in big cities or predominantly white small towns (Mukwevho, 2001).

Challenges faced by prosecutors included a lack of programmes in some areas, and a lack of cooperation from stakeholders including children, parents and the Department of Social Development (Mukwevho, 2001). Prosecutors had not been adequately trained in diversion leading to some policy directives not being appropriately applied (Mukwevho, 2001).

The changing role of the prosecutor has been one of the central matters of discussion within the debate leading up to the introduction of the Bill. It has been questioned whether the duty that prosecutors have to the state and to the victim makes them the

best people to make diversion decisions (Skelton, 1995; Muntingh, 1998). In the original draft of the Bill it was envisaged that prosecutors would play no part in the decision to divert (SALC, 2000b). The most recent draft gave them a role, along with probation officers, with the final order being made by a magistrate. As the Bill passes through the committee stage the role of the magistrate is being considered, and the prosecutor may retain the primary power to determine whether a child should be diverted (PMG, 2003k).

The Magistrate

The most significant role change with regard to diversion in the proposed new Bill is related to the role of the magistrate. Currently it is prosecutors who decide whether or not to divert, and, although magistrates can recommend that a child undergo a diversion programme as an alternative to prosecution, this rarely happens (Muntingh, 1997, 1998).

The introduction of the Preliminary Inquiry will move the magistrate to a central position in the decision to divert; all decisions will have to go through him or her. Sections 60 and 61 of the Bill outline the powers and duties of the magistrate in the inquiry. They must take information from the prosecutor, the probation officer and any other interested parties and then make a decision regarding diversion, prosecution or transfer to a children's court. The magistrate even has the right to make decisions without a probation officer's report being prepared. However, the final draft of the Bill may bind magistrates to follow the diversion recommendations of prosecutors (PMG, 2003k).

The Probation Officer

The probation officer is given a pivotal role within the preliminary inquiry process; the probation officer undertakes the assessment of the child and is accorded wide powers under the Bill (sections 44 and 45). The report prepared by the probation officer is submitted to the prosecutor, containing recommendations on the child's release or

detention and whether the matter should be diverted or should go to the Children's Court.

Programmes

Many children who are diverted will be expected to attend programmes. As previously stated, many South African NGOs have put energy into devising diversion programmes in anticipation of the introduction of the Bill. Some of these projects are described in detail later in this section. Although there is uncertainty about the implementation of the Bill, and some provisions such as the preliminary inquiry remain controversial, diversion has been enthusiastically welcomed, particularly by the NGO sector. Both diversion and restorative justice have already become part of the child justice system, prior to the enactment of the Bill.

Children's Court Conversion

The Bill allows, in section 25(3)(c), that one of the decisions that can be taken by the Preliminary Inquiry is to transfer the case to a Children's Court in terms of the Child Care Act, 1983. This process, known as conversion, has been common practice in some South African criminal courts for some time (Skelton, 1998). Often it was the only form of diversion available to courts, and it was initially suggested by reformers that an increased use of the Children's Court system would be the appropriate way of addressing the deficiencies in the child justice system (Sloth-Nielsen, 2001). However, later research showed that conversion was ineffective and inefficient, and that many children dealt with in that way never arrived at the Children's Court, as there was no compulsion on them to attend once the charges had been withdrawn at the criminal court (Sloth-Nielsen, 2001). The welfare services themselves were also criticised, with state-controlled child care facilities being found to be demonstrating 'gross violations of human rights and squalid living conditions' (Sloth-Nielsen, 2001: 343). The SALC consequently rejected a position, which would have brought welfare provisions into a much more central position in child justice, to make a recommendation that the place of the children's court following the new legislation should be no different than that prior

to the legislation and that a rights-based approach should be more prominent than a welfarist approach (SALC, 1996; Sloth-Nielsen, 2001). Conversion to the children's court is intended for children who commit very minor offences because of a lack of parental supervision, or are in need of basic food and warmth. It is not intended as a form of diversion, and is not mentioned in the chapter of the Bill dealing with diversion (Sloth-Nielsen, 2001).

Cost

Cost is a significant factor in the new policy, as the increased use of diversion will involve new costs. These new costs will include the expansion of existing diversion schemes, an increased demand for the services of probation officers and an active contribution from provincial welfare services to the monitoring of the child justice system (Barberton, 2000; Barberton and Stuart, 2001; ICCJ, 2002).

When this is put into the context of the full implementation of the Bill, it is argued that these costs are more than covered by the savings arising from the reduction in the use of places of safety or custody for children (Barberton *et al.*, 1999; Barberton, 2000; Barberton and Stuart, 2001; Inter- Sectoral Committee for Child Justice [ICCJ], 2002). Savings from reallocation of resources, however, will require government departments to think about budgets in broad terms, in relation to what is good for the country as a whole, rather than what is good for their particular department (Dissel, 2001). The argument that the Bill will save the government money also supposes that savings will be made through staff cuts in some areas, including prisons, which is likely to be a controversial issue.

The Child Justice Bill is one of the first pieces of South African legislation to be fully costed to ensure that it can be implemented and sustained, particularly after the cessation of international assistance provided at the early implementation stages (Barberton and Stuart, 2001; De Lange, 2004; Van der Spuy *et al.*, 2004).

Department of Justice Portfolio Committee

The Department of Justice Portfolio Committee (subsequently referred to as the Committee) received the Bill for scrutiny after it received approval from Cabinet in 2001. The Committee has been critical of aspects of the Bill and recommended redrafting on two occasions. At the time of writing (February 05) it remains unclear when the Bill will be enacted.

The deliberations of the committee show how the Bill was received by the first people (apart from its drafters and advocates) to give it serious consideration. Its reluctance to divert serious offenders will be referred to later in this thesis, as there are echoes of some of the general criticisms that have been made about diversion and about child justice regimes based on rehabilitation. The Committee also shares the concerns of some of the respondents about the implementation of the Bill and the resources that need to be made available.

The Committee's deliberations are also important in that they give some indication of what the final Bill will look like. In the absence of either an amended draft or something approaching a final Bill, an analysis of the Portfolio Committee minutes is the best way to find out how different the final Bill may be from the 2002 version that is current at the time of writing. There will be more constraints on the discretion of the decision-makers than originally envisaged, and the diversion regime is likely to be available to fewer children than the drafters had hoped for. It also appears that the prosecutor will have the final decision on whether or not to divert, with the probation officer carrying out an assessment and the magistrate playing an important persuasive role.

This section considers the deliberations of the Committee, and suggests the form that the Bill might take on its final enactment. The scrutiny of this committee took place in three parts: the hearing of submissions, informal deliberations and, following a redraft of the Bill during parliamentary recess, discussion on the re-drafted Bill. This summary of the committee's scrutiny will follow the same structure.

Committee's Response to Submissions

The Committee, and particularly its then Chair, Advocate Johnny De Lange, a senior ANC Member of Parliament, was especially concerned about two aspects of the Bill: whether it could be successfully implemented, and whether it was appropriate for serious offenders, such as rapists, to be diverted (PMG, 2003a).

The Chair made clear from his first comments on the first day of hearings that he was concerned not just with the content of the Bill but the resources available to implement it (PMG, 2003a). This theme was again referred to in response to submissions from government departments (PMG, 2003b; 2003f), and in discussions on places of safety and monitoring (PMG, 2003c). In his final comments, on the last day of this section of the hearings, the Chairperson reasserted that he needed to be convinced that the Bill would not 'collapse on the public' (PMG, 2003g: 3).

The most significant concern expressed at this stage about the content of the Bill was in relation to the diversion of children who had committed serious offences. This was brought up on the first day, in relation to murder (PMG, 2003a), but subsequent discussions focussed on serious sexual offences, in particular, rape (PMG, 2003d; 2003e). A number of Non-Governmental Organisations (NGOs), including NICRO, SAYStOP and Resources Aimed at the Prevention of Child Abuse (RAPCAN), made submissions advocating that there should be no statutory exclusion of particular offences from the diversion regime (PMG, 2003c; 2003d; 2003e). The Chair raised a number of objections to this, saying that it would not satisfy victims, it would be unconstitutional and that the programmes being offered were neither adequate in content and duration nor monitored sufficiently (PMG, 2003c; 2003d; 2003e). He felt that such programmes would neither be acceptable to individual victims nor to the general public (PMG, 2003e:4):

[The Chairperson] added that there were some serious problems with the SAYStOP diversion programme. For instance, providing a ten-week course of two lectures per week for rapists is unacceptable. Should the public come to hear of this course as a diversion programme, they might respond in outrage.

The Committee raised further issues during this part of its deliberations, including concern about One Stop Centres, stating that such centres appeared appropriate for first time offenders but not more serious offenders (PMG, 2003g). It discussed the roles of prosecutors and magistrates in the preliminary inquiry, without making a final preference as to their respective roles known, and discussed submissions relating to the age of criminal responsibility (PMG, 2003b; 2003c). The Committee also heard from Professor Julia Sloth-Nielsen of the University of the Western Cape that there were a number of children aged between 10 and 14 who were detained in prison at that time (PMG, 2003d; Sloth-Nielsen, 2003c). The Department of Correctional Services responded to this submission by making immediate arrangements for the release of these children (PMG, 2003g).

Informal Deliberations

The next stage of the deliberations dealt with the Bill section by section (PMG, 2003h – 2003n). It is not proposed to give a detailed summary of these deliberations, but the committee's views of the provisions for assessment, diversion and the preliminary inquiry will be considered. The issue of assessment for diversion was referred to; the committee argued that previous convictions and previous responses to diversion should be made available to the preliminary inquiry (PMG, 2003j). In its deliberations on the preliminary inquiry the committee stated that a decision should be made about whether the child belonged in the criminal justice system: if so the case should proceed, if not, the child should be diverted or the case should be converted to a Children's Court Inquiry (PMG, 2003k). It discussed in detail the various roles in the Preliminary Inquiry and suggested that the final decision should lie with the prosecutor, but that the magistrate should have considerable opportunity to persuade and influence the decision (PMG, 2003k). There was also a discussion regarding excluding some serious offences from the diversion regime entirely (PMG, 2003k). The committee made it clear that

offences where the child would be sentenced to more than six months in custody would not be considered for diversion (PMG, 2003k). It summarised its proposals for restricting the Preliminary Inquiry to children who have committed offences that are serious enough not to be diverted automatically, but not so serious as to prohibit diversion (PMG, 2003k: 4):

The group that is left in the middle, consisting of Schedule 1 offenders who are not automatically diverted, Schedule 2 offenders, and those Schedule 3 offenders that are eligible for diversion, would participate in the preliminary inquiry.

The Committee adjourned for five months, instructing the Department of Justice to make the necessary revisions (PMG, 2003n).

Discussion on the Re-drafted Bill

This section will focus on the Committee's discussions of assessment, diversion and the preliminary inquiry in August and September 2003 (PMG 2003o – 2003w). It was clear from the minutes of the first meeting in this session that the Committee had considered some of the Bill's provisions in the intervening time; the Chair suggested that a detailed discussion was needed on whether some rape cases should be divertible (PMG, 2003o). However, visits to child justice facilities had provoked disquiet (PMG, 2003o:7):

The Chair pondered on the Committee's trip to the Child Justice Centre in Port Elizabeth. He said that there was a Police Officer there who would beat up children (all be it [sic] with the consent of the parents). Also the Child Justice Centre was sending all the children to the prison for crimes involving dishonesty and not the secure care facility which was very much under-used.

The Committee appeared to be moving towards a position where the police would be encouraged to divert very minor offences without recourse to a preliminary inquiry, and very serious cases (the example provided was murder) would not go through the Preliminary Inquiry process as there was no prospect of them being diverted (PMG, 2003r; 2003s). It said that there was no need for a preliminary inquiry where there was no prospect of diversion (PMG, 2003r; 2003s). It reached a position where some rape

cases would be entirely excluded from the diversion regime, but there would still be a possibility of some children who had committed rape being diverted (PMG, 2003o). The details of this remain unclear until the re-drafted Bill is published.

Developments in 2004

The election in South Africa in 2004 caused further delay in the enactment and implementation of the Bill and it was only the introduction of special legislation that allowed the Bill to continue in the parliamentary process after the election. Following the election, Brigitte Mabandla MP was appointed as Minister for Justice and Constitutional Development and Johnny de Lange, MP, the former chair of the Portfolio Committee, was appointed as her Deputy Minister. De Lange has, to date, made only one post-election public statement about the Child Justice Bill in the budget speech on 29 June 2004 (De Lange, 2004). He suggested that the completion of the Portfolio Committee's work and the implementation of the Bill were imminent. He was confident that it had been properly planned and costed inter-sectorally and that the establishment of adequate reform schools and One Stop Child Justice Centres would be an important part of its successful implementation (De Lange, 2004). The new minister, asked to study the Bill before it was returned to the Portfolio Committee (PMG, 2004c; 2004d). At the time of writing the Bill has not been returned to the Committee and Mabandla has not commented on it in public.

Most recently, the Bill has been discussed by the Department of Social Development (DSD) Portfolio Committee, in August 2004, as part of its deliberations on the Children's Bill (PMG, 2004a; 2004b; 2004e; 2004g). The Departments of Justice and Constitutional Development and of Correctional Services made presentations to this committee, and reiterated the need for a joint approach to meeting the needs of children in conflict with the law (Department of Correctional Services, 2004; Department of Justice, 2004a; PMG, 2004e). Concern about the number of children in prison and the conditions in which they were kept was expressed by this committee, and in a statement

in October 2004 the Minister of Social Development made a commitment to give priority to the removal of children from prison (DSD, 2004).

South African Child Justice Projects

As part of the setting of the context for the fieldwork, this chapter contains a brief description of some of the prominent child justice projects in South Africa. Although the Child Justice Bill is yet to be enacted, the lengthy process of drafting and preparing for it has allowed diversion to become an important part of the South African child justice system. NICRO is the largest provider of such programmes. The availability of these programmes has allowed them to be used for diversion even prior to the introduction of the Bill and they are referred to by the respondents in discussing the case vignettes. This section will describe three high profile projects: the NICRO Youth at Risk project, the South African Young Sex Offenders Programme and the Port Elizabeth One Stop Youth Justice Centre. All three of the projects described were visited, conferences where project leaders presented were attended and the relevant literature was accessed.

NICRO Youth at Risk Project

NICRO describes itself as a national crime prevention non-profit organisation working towards a safer South Africa (NICRO, 2004). It offers diversionary programmes for child offenders, diverting children away from the criminal justice system into programmes that make them accountable for their actions. Most of its referrals come from prosecutors who agree to withdraw cases on the condition that the child attends a diversion programme. NICRO tailors a particular programme for each participant. The programme is made up of parts of four elements: pre-trial community service, a family group conference, the journey adventure learning programme and the Youth Empowerment Scheme (YES). YES is a life-skills training programme which usually runs for six to eight sessions. Its aim is to help the participants to consider their lives and the consequences of their actions.

NICRO is the largest provider of diversionary services in South Africa (Mpuang, 2004). In the period March 2003 – April 2004 the National Prosecuting Authority diverted 17961 children, or 1500 children per month, and NICRO worked with 92% of them, a total of 16534 children (Mpuang, 2004).

NICRO has a national office and branches in all of South Africa's nine provinces. In the Eastern Cape it has a provincial office in Port Elizabeth and branches in East London, Queenstown, Umtata and Uitenhage. A recent study into victim support services found that NICRO's services are considerably easier to access in urban areas than in rural areas (Lutshaba *et al.*, 2002). This is likely to be equally true for services for child offenders.

NICRO also launched the DIME (Diversion into Music Education) programme in 2001, as part of a partnership with the University of the Western Cape. After completing a six-week life skills programme participants are given an opportunity to play African music. They can learn to play marimba instruments, sing and dance as a way of encouraging them to take pride in their culture (Gallinetti, 2001c).

SAYStOP (South African Young Sex Offenders Programme)

History and Background

The SAYStOP initiative originated in the Western Cape in 1997, following a conference held by RAPCAN and the University of the Western Cape. A working group was constituted and by the end of May 1998 a programme manual had been devised for children who had committed a first sexual offence with few aggravating factors.

Referral and Assessment Process

Children can be placed on the programme via three referral routes: formal diversion, as an alternative or addition to a sentence or following a referral from a non-criminal justice agency. The children are assessed to ensure that they are aged between 12 and 16 and that they take responsibility for their offending. Where possible, the victim is consulted.

In its evaluation of the 2000 programmes, SAYStOP explains that the majority of boys (although the assessment criteria are not gender specific, no girls attended programmes in 2000) who attended a SAYStOP programme in 2000 were 14 years of age, attending school and residents of poor socio-economic areas. Most had been charged with either indecent assault or rape, and had no previous charges or convictions.

Content of the Programme

The content of the programme was initially based on the NICRO YES programme, and has evolved over time into a ten session programme. The themes of the sessions are: crime awareness; self-esteem; understanding my body; sexuality, socialisation and myths; victim empathy; relapse prevention and the way forward.

Research and Evaluation

There has been some evaluation carried out of the early SAYStOP projects. Meys (1999) found that the child typically accepted responsibility for his actions, there was a perceived improvement in family functioning, and the child and family considered that the action that had been taken was appropriate. The research found that additional intervention measures were instituted by the facilitators in cases where the child was considered to be at high risk of reoffending.

A follow up study (Wood, 2002) was carried out with the participants in those three pilot programmes. Only 9 of the 28 children who completed the programme could be

located twelve months later, and 6 of those agreed to participate in the follow up study. The other 19 children appear to have had no ongoing contact with statutory services, and there is no way of establishing whether they had continued to offend. The findings of the study with the 6 participating children were positive, the children appeared to retain many of the concepts taught, and the participants felt that they had adopted a different perception of what they had done. The caregivers also described the programme as valuable and felt that it would prevent recidivism.

SAYStOP in the Eastern Cape

SAYStOP was introduced in the Eastern Cape in 2001, in response to a request from the NICRO regional office in Port Elizabeth. In June of that year a number of professionals, including social workers, probation officers, lawyers and a magistrate, were trained in the delivery of the programme and educated as to its purpose. The first Eastern Cape programme commenced in November 2001, in East London, with three participants.

The introduction of the programme in the Eastern Cape has faced many challenges and disappointments, including non-attendance at meetings by key professionals, and negative attitudes towards the SAYStOP programme. It also appears that the predicted demand for the programme did not materialise. The local director of NICRO expressed disappointment at the small number of referrals to the programme. He said that there was a need for greater training of key personnel and that there should have been a thorough needs analysis carried out before the programme was introduced to the Eastern Cape (Cagwe, 2002).

‘Stepping Stones’ One Stop Youth Justice Centre, Port Elizabeth

Stepping Stones came into full operation in August 1997, as a response to the perceived crisis in the South African Youth Justice system at that time (Inter-Ministerial Committee on Young People at Risk [IMC], 1998). In particular, following the chaos

caused by the unconditional release of children in 1995 the Port Elizabeth Regional Working Group came to the conclusion that a comprehensive, holistic service was needed to address the fragmentation in the current system. The Royal Netherlands Embassy provided funding to establish the Stepping Stones Centre.

The dominant organising concept of the Stepping Stones Centre is that all youth justice services are contained under one roof (IMC, 1998). The Centre contains a Youth Court, a police station, police cells, a waiting area, rooms for group work and individual work and offices for social workers and probation officers. It was the first such facility in South Africa, although the Child Justice Bill provides for the establishment of similar arrangements throughout the country. Stepping Stones describes itself as South Africa's only child friendly court (Stepping Stones, 2000).

The Centre sees five main benefits to the centralised system: time saving, an emphasis on restorative justice; teamwork; restoring children to their families and the creation of a child friendly environment (Stepping Stones, 2000). It operates a number of diversion programmes, including the YES programme, pre-trial community service, victim offender mediation and the SAYStOP programme.

The major challenge that Stepping Stones faces, according to its staff, is that too many children are still being detained for lengthy periods of time in police cells or in custody (Stepping Stones, 2000). They identify the lack of availability of other resources and the frequent difficulty in tracing the parents or guardians of arrested children as the main factors in keeping the numbers of children in custody at a high level.

Stepping Stones is an extremely significant project both in the context of the Eastern Cape and the whole of South Africa. This is not only due to its appearance as a model project in the Child Justice Bill, but also because it is perceived as a centre of innovation and excellence in its region, so any new projects or programmes are piloted there.

Other Diversion Programmes

Although these programmes described above are the main ones, there are many other diversion projects in operation, some national, some local. The United Nations Child Justice Project (Department of Justice, 2004b) has carried out an audit of other diversion programmes that are available in South Africa, and identifies seven categories; Developmental Skills and Life Centre Models; Peer/ Youth Mentorship; Wilderness/ Adventure Therapy; Skills training and Entrepreneurship; restorative justice; counselling and therapy and combination programmes. NICRO expects the Bill to lead to an increase in the use of diversion, and a greater take-up of its programmes (Mpuang, 2004). The government is committed to developing more One Stop Youth Justice Centres as the Bill is enacted (De Lange, 2004). The future development of SAYStOP is less certain, as it is unclear to what extent diversion for children who commit sexual offences will be permitted (PMG, 2003o; Ehlers, 2004). However, SAYStOP will continue to provide programmes for these children, either as diversion or sentence.

This section has set the historical, legislative, political and practical context for the implementation of the Bill. The next section of this review will outline the main theoretical perspectives that influenced the drafting of the Bill.

THEORETICAL AND IDEOLOGICAL INFLUENCES

This part of chapter two considers the theoretical and ideological influences on the Bill. The fieldwork of this research concentrates on the use of discretion by criminal justice professionals and the first section considers the use of discretion. Following that there will be an outline and critique of five main theoretical and ideological influences on the Bill, as well as the rationale of working with child sex offenders. The final sections of this chapter outline two discourses that played little part in the development and implementation of the Bill but can assist in understanding it and in analysing the research.

Discretion

The Child Justice Bill provides criminal justice practitioners with a large amount of discretion; probation officers, prosecutors and magistrates working together will make decisions about children and each individual will be able to have a significant influence on the immediate future of a child with whom they come into contact. This ability to exercise discretion existed even prior to the enactment of the Bill since prosecutors in particular have considerable discretion in deciding whether children should be diverted (Mukwevho, 2001).

The investigation of the use of discretion is an important aspect of the fieldwork of this research. In this section of the review, literature on the use of discretion will be considered in order to provide insight into how decisions are made by practitioners.

Defining Discretion

Discretion is what remains once what constitutes the law has been outlined (Dworkin, 1977:39):

Discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept.

Dworkin (1977) identifies two senses of discretion. The strong sense of discretion is when the decision maker is not bound by any standards set by a higher authority. It is, however, in the weaker sense that discretion is exercised by practitioners in the preliminary inquiry; decisions cannot be made mechanistically but demand the exercise of judgement.

Gelsthorpe and Padfield (2003:3) provide a more detailed definition:

Discretion refers to the freedom, power, authority, decision or leeway of an official, organisation or individual to decide, discern or determine to make a judgment, choice or decision about alternative courses of action or inaction.

In the preliminary inquiry the choices of the probation officers, prosecutors and magistrates relate to whether or not to divert, what option to divert a child to and what to do if the decision is not to divert.

There is a risk of discrimination when the law is permissive and individual discretion is wide as decision-making can then be based on subjective judgments (Gelsthorpe and Padfield, 2003). The relationship between discretion and justice is thus an important one.

Discretion, Assessment and Justice

There is potential for the use of discretion to be unjust in a number of ways (Hawkins, 1992). Subjectivity can lead to inconsistency, and this can then give the impression that decisions are being made arbitrarily. Discretion also provides considerable power to officials, allowing scope for abuse.

There is an inherent tension between justice and discretion; to be fair, law must be both predictable and flexible. A balance must be struck between uniformity and

individualisation of treatment (Hawkins, 2003). The use of discretion is often associated with concepts such as compassion, forbearance and mercy. Gelsthorpe and Padfield (2003) suggest that decision makers may resort to using mercy as a justification when they have vague compassion for the offender but cannot articulate a precise justification for their decision. However, the assumption that wide practitioner discretion does not lead to just and consistent practice is not necessarily a correct one (Eadie and Canton, 2002).

Kemshall (1998a) found that when discretion was not exercised within a risk framework practitioners tended to make decisions based on comparisons between the present cases and previous, similar cases that they had encountered. This meant that decisions were based upon previous practice experiences, the theoretical views of the assessor and their biases, values and beliefs (Kemshall, 1998a). The potential benefits of applying a risk framework to diversion decision-making in South Africa will be discussed later in this thesis.

The concern about the link between discretion and justice in the Bill was evident in the deliberations of the Portfolio Committee (PMG, 2003o). The committee intends to limit the discretion that it would be possible to exercise in diverting sex offenders, as it is concerned about the possibility of unduly lenient, unjust sentences. This emphasises the point made earlier that practitioners will exercise discretion in the weak sense (Dworkin, 1977): they will use judgment but will be restricted by laws and guidelines.

Values and Discrimination

There is a risk that a system that relies heavily on the use of discretion may be unduly influenced by the values, or even prejudices, of the practitioners who operate it. The values exercised by an individual or an organisation are an important part of discretionary decision making (Hawkins, 1992: 44):

Moral concerns tend to predominate in screening decisions and the kind of moral character ascribed to an individual determines the agency's obligation to the client.

An example of the tension is with regard to regional variations in decision-making. As Ashworth (1998) identifies, regional variation should not be entirely eliminated as many innovative criminal justice practices originate as regional initiatives. In South African child justice SAYStOP, Childline and the One Stop Youth Justice Centres are all examples of innovative local initiatives. However, too much independence from the criminal justice system may contain potential dangers (Ashworth, 1998: 305):

Local variations in practice should be monitored and local variations in policy should only be permitted if clear justifications can be found: this would expose the unwarranted whilst enabling experimental schemes to be introduced.

It is also possible for discretion to be exercised in a discriminatory way, at every stage of the criminal justice process, on the basis of gender, class or race (Cavadino and Dignan, 2002). Such discrimination does not have to be conscious; it can be based upon unconscious assumptions or thought processes (Cavadino and Dignan, 2002). Hudson (2002: 303) warns of the danger of a system that results in the division of girls into the “respectable and decent” and the “promiscuous and dangerous”. Dissel and Kollapen (2002) put racism and discrimination in the South African penal system into a historical context; access to justice under apartheid was racially defined. It is more difficult to determine the effect of discrimination on decision-making in the South African criminal justice system after the end of apartheid, and much of the research is inconclusive. Dissel and Kollapen (2002) were unable to compare the crime rate of any racial group to the imprisonment rate, as data on arrest and conviction according to race group is not gathered by the police or the Department of Justice. They did find that prisoners were imprisoned, sentenced and paroled in a ratio proportionate to the national population. Muntingh (1995, 1997, 1998), on behalf of NICRO, found that the prosecutor’s decision to divert was sometimes affected by considerations of race, but later research by the same organisation (Muntingh, 2003; Mpuang, 2004) found that children were placed on diversion programmes in a ratio proportionate to the national population. Gallinetti *et al.* (2003) suggested that issues of race and class still prevailed in

restorative justice processes, but that most processes were carried out between an offender and victim of the same race and class. This present research found some evidence of decision-making that was influenced by race and gender stereotypes and this will be described in chapters three and four.

Discretion and Diversion

Discretion is closely associated with diversion to the extent that the terms are sometimes confused (Gelsthorpe and Padfield, 2003). In South Africa, prior to the introduction of the Bill diversion decisions give a lot of discretion to professionals, particularly probation officers and prosecutors (Muntingh, 1997). In the United Kingdom, the Children and Young Persons Act 1969 encouraged diversion from court, a trend that continued through to the 1980s and 1990s (Smith, R. 2003). This was successful in the sense that the number of young people in court and in custody was reduced but it led to concerns about the widening of the net of social control (Garland, 2001). Whether the use of diversion widened the net of social control was never definitively proven but the subsequent decline in the use of diversion was linked to the development of a climate of popular punitiveness (Garland, 2001). The perceived need to be seen to be taking youth crime seriously and to be dealing with cases quickly was considered incompatible with the use of diversion (Kemp and Gelsthorpe, 2003).

The current system of diversion of young offenders in the UK involves the use of Referral Orders but this is strictly restricted to children who have committed offences for the first time (Goldson, 2000; Crawford and Newburn, 2003), so that the scope for the exercise of professional discretion by practitioners is much more restricted (Smith, R., 2003), although the police still have authority to divert children altogether. Ashworth (1998) suggests that the exercise of discretion at the diversion stage should be influenced by certain values: the need to prevent crime; allowing the decision to be diverted or not to be free and fair; compensating victims; rehabilitating offenders and proportionality.

In the UK, discretion has become much more structured, both in relation to decision-making for young people and for adults (Goldson, 2000; Cavadino and Dignan, 2002; Crawford and Newburn, 2003; Smith, R., 2003). Actuarial risk assessment has become a much more important part of decision-making (Kempf-Leonard and Peterson, 2000; Kemshall, 2003) and this is considered later in this chapter. The analysis of the fieldwork in chapter four considers the use of discretion by South African child justice professionals.

The following part of section two of the literature review outlines five of the most significant theoretical and ideological influences on the development of the Child Justice Bill: children's rights, diversion, rehabilitation, restorative justice and managerialism. It also considers the rationale for working with child sex offenders.

Children's Rights

The campaign to introduce and implement the Bill has been dominated by those who argue from a perspective of children's rights. In this section, the development of that approach in South Africa will be described, along with possible threats to the promotion of children's rights within South Africa.

Children's Rights in South Africa

Scruton and Haydon (2002) argue that an emphasis on children's rights is a way of protecting the weak from the possible abuses of the strong and of promoting a welfare approach instead of merely a just deserts approach. They identify three ways in which a children's rights approach, in particular one based on the UN CRC, should lead to a welfare approach to child justice. Firstly, the status of children means that they should receive a different response from adult offenders. Secondly, priority should be given to children's welfare so that they receive treatment and support rather than punishment or deterrence. Thirdly, children should be able to participate fully in decisions that affect them. A rights-based approach should protect and promote the interests of children.

In South Africa, the children's rights approach can be traced back to before the first free elections in 1994 (Skelton, 1999; Van der Spuy *et al.*, 2004) and much of the emphasis on children's rights can be seen in the developments described in the earlier part of this chapter. Some of the advocates for the implementation of child justice legislation had become familiar with arguing from a child rights perspective in the ultimately successful fight against the use of corporal punishment (Sloth-Nielsen, 1990). The use of whipping as punishment was declared unconstitutional in *S. vs. Williams and others* [1995] (Skelton, 1998) in what was seen, in advance, as an important recognition of the essential humanity of all South African subjects (Van Zyl Smit, 1990). This decision, as well as national and international legal developments, such as the adoption of the Constitution, informed the public debate on children's rights throughout the 1990s. The two high-profile events described in the last chapter, the death of Neville Snyman and the premature release of child prisoners in 1994, also had a significant influence on debate (Skelton, 1998). The advocates of a rights-based approach to child justice within South Africa saw the incorporation of section 28 into the Constitution as a significant triumph for their campaign (Skelton, 1998). Child justice reformers also rely heavily on international instruments such as the UN CRC (Skelton 1996; Sloth-Nielsen, 1999b) which are referred to by the Law Commission in its recommendations for change that have become formulated in the Bill.

The Development of a Children's Rights Discourse

The ascendancy of a children's rights approach in discussions of new child justice legislation can helpfully be put in the context of the development of South African criminology. Historically there have been three major tendencies in South African criminological thought (Van Zyl Smit, 1999). Throughout most of the century the dominant criminological theoretical approach was a nationalist Afrikaner approach that justified apartheid as a means of crime control. The second approach was a form of liberal reformism, where lawyers and social workers recognised formal equality before the law and advocated managerial fairness without challenging the status quo. The third

radical approach, to which Van Zyl Smit (1999) gives the title of 'criminology for a new democratic South Africa' challenged the status quo and opposed the apartheid state.

During and after the process of transformation in the 1990s, nationalist criminology rapidly declined; liberal and especially radical criminology, became the dominant approaches (Van Zyl Smit, 1999). Progressive criminologists gave thought to issues such as policing, community involvement and the treatment of child offenders (Van Zyl Smit, 1999). A conscious attempt was made to build a coalition of progressive forces which could unite around new ideas for dealing with children (Skelton, 1996; Sloth-Nielsen, 1999; Van Zyl Smit, 1999). There was a recognition that more than just diversion was needed; the concerns of the community had to be taken into account, and this led to reformers advocating for a restorative justice approach (Skelton, 1996; 2002b). Van Zyl Smit (1999) emphasises the importance of the reform of child justice to South African criminological thinking and to the country as a whole suggesting that it attracted more debate during the transitional period than any other criminal justice issue, and was connected to ideas about how a future South African society might be organised.

The campaign for child rights was led by those who would, in other times, have identified themselves with either the liberal or the radical traditions (Dixon, 2004). They have both engaged in theoretical debate and played a part in social reconstruction. Children's rights campaigners have not merely concentrated on legislative change but have also been involved in designing and implementing diversion programmes, such as SAYStOP, and the DIME project which anticipate the enactment of the Bill (Gallinetti, 2001c; Stout & Wood, 2004). Other examples of criminological fields where this sort of engagement took place include work on peace committees and domestic violence legislation (Parenzee et al, 2001; Roche, 2002, 2003; Dixon, 2004).

The emphasis on children's rights in the Bill and the campaign to have it implemented is a product of the people who have been involved in drafting it and campaigning for it. Garland (2001) has described how penal-welfarism has lessened in popularity in the UK

and USA due to the declining influence of the middle class professional elite, **whereas** in South Africa it could be argued that liberal professionals still have influence and **have** promoted a children's rights approach.

In South Africa the main statutory influences on the Bill have been the South African Constitution and the requirements of international instruments. It is the influence of a professional elite that has achieved this emphasis on child rights and this focus on national and international legal stipulations. This is true both for the content of the Bill and the public discourse around its implementation.

South African criminology has been able to influence the development of policy and legislation, particularly within the field of child justice, through that country's transition (Van Zyl Smit, 1999). In another transitional society, Northern Ireland, criminologists have been actively involved in developing restorative justice initiatives in communities where the police have not been accepted (McEvoy and Mika, 2002; McEvoy and Ellison, 2003). It appears that societies in transition can be open to the influence of innovative criminological theory, allowing criminologists to become actively involved in the criminal justice decision-making process in a way that would not otherwise be available to them. In South Africa, the real influence that the child justice reformers have will perhaps not be truly known until it is clear if, when and in what form the Bill is implemented.

Threats to Children's Rights in South Africa

Although the children's rights approach remains a significant ideology in current South African criminology and is a major informing ideology behind the draft Child Justice Bill, it is clear that political realities do provide significant resistance. The most dramatic victories of the 1990s have come not from radical criminologists but from liberal legal reformers who have succeeded in abolishing both capital and corporal punishment (Van Zyl Smit, 1999). The unfortunate release and absconding of child offenders, some of whom had committed violent offences, may have led to a public

perception that promoting children's rights and preserving public safety were contradictory aims (Skelton, 1996). There is a dissonance between the language of child rights used by campaigners and the public discussions of crime in South Africa.

A challenge to the emphasis on children's rights is posed by the social and political climate in which the child justice debate is occurring. Garland (2001:163) suggests that the UK and the USA have developed what he calls the 'crime complex of late modernity'. This is a set of ideas and assumptions about crime that finds even more extreme expression in South Africa (Dixon, 2002). In South Africa the concern about crime is combined with a lack of faith in the state's ability to control it. In poor rural areas individuals, and even businesses, will go to vigilante groups before they go to the police (Von Schnitzler *et al.*, 2001) and in wealthier areas individuals rely on security firms for protection (Shearing and Kempa, 2001). This concern about crime and lack of confidence in the agents of the state makes it probable that at some point the state will 'act out' the public view (Garland, 2001) and take a more punitive approach to child crime.

A threat to the children's rights emphasis can be seen in the incident, described in the last section, when child offenders were prematurely released. Van Zyl Smit (1999) has argued that the government's preoccupation with child crime and the criticisms that it faced after this incident could put the enactment of child justice legislation in jeopardy. The government demonstrated 'wavering political will' when children's rights came into conflict with fears about crime (Sloth-Nielsen, 1999a: 475). The Bill still has obstacles to cross before its final enactment, and it is likely that the Act that is produced after the work of the Portfolio Committee will be vastly different to that submitted to it.

While child justice reformers had some influence in drafting the content of the Bill, they have had less success in seeing that it is enacted and implemented. Sloth-Nielsen (2000: 393) predicted that it would be "likely to be tabled in Parliament in 2001" yet in 2005 the Bill is still awaiting Parliamentary approval. Van der Spuy *et al.* (2004) argue that the twentieth century history of child justice in South Africa has been characterised by good intentions on the part of small numbers of individuals, which have not been

implemented by government. Perhaps this is the reason that children's rights advocates have not solely concentrated on devising the legislation and campaigning for its implementation but have also been involved in devising diversion programmes that anticipate the Bill but are not wholly dependent on its implementation.

The amendments made by the Department of Justice Portfolio Committee demonstrate that the rights emphasis is not universally accepted within South Africa and that elected representatives, who are extremely sensitive to public opinion, are prepared to balance child rights against other demands, such as public protection and the need to be seen to punish (PMG, 2003o). The Bill is framed within a children's rights paradigm, but perhaps does not promote children's rights as strongly as it first appears to. As well as considering what the Bill says it is important also to consider what is absent from it, and to consider the legal and social environment into which it will be introduced. Although the Bill does provide some new sentencing options for convicted child offenders, its emphasis is firmly on pre-trial diversion. Serious or repeat offenders may find that they are dealt with after the Bill in a very similar way to that in which they were dealt before its implementation, while it is only the first time offenders who have committed minor offences who appear liable to be treated differently. The focus on diversion can be seen in the preparation of the various organisations for the Bill's enactment. Both NICRO and SAYStOP are targeting the bulk of their resources and their highest profile programmes at the diversion level, with little, if any, work going into devising community interventions for sentenced serious and repeat offenders. There has also been no determined effort to build new places of safety or other residential accommodation for children who need to be detained. So there remains a risk that those who persist in offending or commit serious offences may continue to be incarcerated in unsuitable accommodation. A commitment to universal children's rights will mean that consistent service will have to be offered throughout South Africa, and that children being treated in different ways depending on where they live will not be considered acceptable.

The system that may emerge could be similar to that referred to by the South African Law Commission as it explained the need to exclude some children from the new regime (SALC, 2000b: 9):

The realisation has grown as the investigation has unfolded against a backdrop of rising public concern about crime, that in order to give the majority of children (those charged with petty or non-violent offences) a chance to make up for their mistakes without being labelled and treated as criminals, the Bill would need to be very clear about the fact that society will be protected from the relatively small number of children who commit serious, violent crime.

The rights of children who commit serious offences will have to be balanced against the rights of other groups in society, so a child rights emphasis will not be sufficient, on its own, to protect all child offenders. The next two sections consider other influences that have contributed to the South African child justice discourse: diversion and rehabilitation.

Diversion

Diversion involves the referral of cases away from the criminal justice system where there is enough evidence to bring a prosecution (Gallinetti et al., 2004). The emphasis in the Bill on children being diverted from the criminal justice system has its origins in both criminological theory and in policy considerations. Both these influences are considered in this section, before the following section outlines the basis for implementing rehabilitative programmes as part of this diversion.

Labelling Theory

The practice of diverting children and young people away from the criminal justice system is closely associated with labelling theory. Labelling theory argues that for an act to become defined as a crime two activities must take place; the individual or group must act in a particular way and a second group must label the act as deviant (Becker, 1999; McLaughlin and Muncie, 2001). The theory focuses on the reaction to crime; it

sees the administration of crime, not its origins as the key to understanding the phenomena. It is an important influence on new deviancy theory which originated as a radical response to positivism; new deviancy theory emphasised both the diversity of behaviour and the ubiquity of deviance (Young, 1981). Labelling theory also draws on symbolic interactionism, which suggests that individuals gain clues about how to behave from how others treat them and react to them (Giddens, 1997). Labelling theory denies that any act is always criminal and rejects the idea that offenders are 'a species apart' (Muncie, 2004:119).

Diversion has been described as the practitioner's outworking of labelling theory (Scull, 1989). In contrast to Farrington's (1986) view that children who offend are identifiably different from those who do not, labelling theorists argue that law and its enforcement are socially constructed so that what distinguishes children who offend is not their actions but that their actions are defined as criminal (Pearson, 1996). The logical outworking of the theory is that as far as possible the state should not place the label of 'criminal' on an offending child but instead deal with him or her outside the criminal justice system. Labelling theory argues that it is possible, or even likely, that the state's response to offending could make the situation worse rather than better (Cohen, 1985). It thus gave rise to diversion schemes as part of the philosophy of radical non-intervention (Schur, 1973). Labelling theory can lead to a regime where offending is tolerated until it becomes serious or persistent, at which point offenders are placed in intensive but non-stigmatising programmes in the community (Pitts, 2004).

A practical example of labelling theory leading to diversion schemes is provided by British youth justice policy in the 1980s and the 1990s, including the Criminal Justice Act (1991). During this period, the ideas of minimum intervention and diversion came to dominate much youth justice practice in England and Wales (Audit Commission, 1996; Bell *et al.*, 1999; Newburn, 1999). In the 1990s this was justified politically not as a reawakening of welfare principles but as a way of delivering punishment in the community (Muncie, 2004). Notwithstanding this political explanation, the premise was that the justice system was punitive, stigmatising and merely reinforced attitudes and behaviours that had brought young people into the system in the first place.

Consequently, the working practice of the youth justice professional was to ensure that the offender had the shortest and least damaging contact possible with the youth justice system.

Labelling theory has some contemporary popularity in South Africa; Muntingh and Shapiro (1997) describe the need to avoid children being labelled as criminals as one of the aims of diversion and Tshiwula (2002:4) has called for an end to all clinical labels, saying instead that new terms should be used:

Try new words in thinking of young people, e.g. talented, gifted, filled with greatness, etc.

Diversion and Bifurcation

Diversion is often introduced as a form of bifurcation, allowing a government to show that it is being harsh on serious crime while at the same time saving money and reducing the pressure that is on the system. Bifurcation is a concept whereby serious penalties, notably imprisonment, are reserved for serious or repeat offenders and less serious offenders are dealt with in a more welfare-oriented way in the community (McLaughlin and Muncie, 2001; Matthews, 2003). It is an example of the tendency for criminal justice systems to be based around classification distinguishing the deserving from the undeserving and those who should receive treatment from those who should not (Cohen, 1985). Youth justice policy in the UK in the 1980s and 1990s demonstrates this process (Smith, R., 2003; Hughes, 2001) but ultimately even those offenders who were being treated less harshly came to receive punishment in the community rather than treatment (Cavadino and Dignan, 2002).

A policy of bifurcation can be a pragmatic and inexpensive way of achieving legitimacy with the public (Cavadino and Dignan, 2002). More severe sanctions serve the purpose of reassuring the public that all crime will not be dealt with in a soft way (Cohen, 1985). New measures can be plausibly presented as being focussed on diversion, yet can lead

to even harsher sentences being imposed on those who are deemed to be deserving of custody (Sparks, 2001).

The Bill was initially conceived as providing a diversion regime for most children who offended (Skelton, 2002a; Sloth-Nielsen, 2003b) but as it has progressed through the political system it appears to have become increasingly likely that it will result in some form of bifurcated system whereby only first-time and minor offenders are diverted, and more serious child offenders are still dealt with by prosecution and, possibly, incarceration. The present system, of prosecutorial discretion, does currently result in some very serious offenders being diverted; from April 2003 – March 2004 NICRO diverted 2777 children for violent offences including armed robbery and murder (Mpuang, 2004). The organisation also handled 158 rape cases (Mpuang, 2004). It appears probable, however, that when the Bill is enacted such serious cases will no longer be diverted (PMG, 2003o).

Cost of Diversion

A growth in the use of diversion is consistent with the increased corporatism in youth justice (Pratt, 2002). Giving social workers extra discretion is a way of saving costs and reducing the burden on the state. Boundaries between private organisations, NGOs and the state are blurred. In the UK, multi-agency diversion panels divert many juvenile offenders away from the formal criminal justice system, thus saving costs (Pitts, 2003).

Garland's view of the increased use of diversion in the UK and the USA is that it is part of a process of "defining deviance down" (Garland, 2001:117). Governments have been unable to deal with all but a small proportion of minor crime so they have excluded some crimes from the criminal justice system, such as drug possession and first time theft offences committed by children. This is part of a responsibilisation process, where the state devolves responsibility for some crime control matters to communities (Garland, 2001). This has been done more for cost and management reasons than for criminological reasons, however (Scull, 1977; Garland, 2001).

The cost savings of diversion have been a factor in the campaign to increase its use in South Africa (ICCJ, 2002). As Barberton (2000) describes, the increased use of diversion in South Africa will result in substantial savings. Any extra costs in personnel or in the development of schemes will be more than covered by the savings arising from the reduction in the use of places of safety or custody for children. Additionally, the inexpensive nature of many of the proposed diversion options holds particular relevance for under-resourced rural areas where formal diversion options are currently not available.

However, arguments relating to cost are complementary to arguments relating to the benefits of diversion for children and the need for South Africa to meet its obligations under international law. The desirability of diversion was identified by Penal Reform International (2000d) as one of ten points towards reducing violence against children in the criminal justice system. The UN CRC enshrines the desirability of diversion from the criminal justice system, but the previous South African system did not provide for it. The purpose of diversion has been outlined in the Bill as attempting to accomplish the broader objective of entrenching restorative justice practices into the child justice system. The Bill is distinguished both by its children's rights emphasis and its attention to budgetary detail.

Barberton *et al.* (1999) estimated that, following the implementation of the Bill, over 50 per cent of children (nearly 72 000 children annually) arrested would be diverted or receive alternative sentences, in contrast to the current situation where such options are only taken with 20 per cent of children arrested. To date, it is NGOs who have taken the initiative in developing diversion interventions, even prior to the enactment of the Bill. This increased need for the provision of diversion services has given rise to new partnerships between NGOs and the state. The relative affordability of diversion must be seen, in a South African context, as complementing the arguments about the benefits for children and the requirements of international law.

Policy Debates Regarding Diversion

In the 1980s, in the UK, diversion was able to create a strong alliance between the welfare intentions of the social work profession and the desire for efficiency and economy from the Conservative government (Bell *et al.*, 1999). It is also common internationally that successful diversion projects originate in communities and are then enshrined in legislation, rather than being imposed from the top down (Smith, R., 2003) and this increases the likelihood of widespread support being achieved. This same process can be seen in South Africa where diversion appeals both to liberal reformers and to policy makers who need to be aware of the costs of implementing new legislation in a country where there are many pressing demands on limited state resources. As well as bringing together those from differing political perspectives, the use of diversion is considered to be a way of resolving, and moving beyond, debates that place welfare and justice in opposition to each other (Bell *et al.*, 1999; Pratt, 2002). In South Africa, it has allowed the language of children's rights, and that of rehabilitation to come together.

It is in its claims to success that diversion can unite different political perspectives. The increase in the use of diversion in the UK in the 1980s led to a decline in the percentage of those who were found guilty being incarcerated, from 8% in 1981 to 2% in the early 1990s (Smith, R., 2003). More recently, Landau's (2004) research into diversion for adults who had committed minor offences, in Canada, found that the scheme had created satisfaction for offenders, defence solicitors, prosecuting solicitors and community representatives. The attractiveness of such a policy is clear to those in South Africa who wish to see an end to the incarceration of children.

Some of the most sustained criticisms of the increased use of diversion in other jurisdictions have come from critics who believe that this process has served to expand the reach of the state. These arguments will be considered below and related to the Bill and to the South African context.

The concept of the state as having a corrupting power is a very familiar one in South Africa in general, and in child justice in particular. The campaign for a separate child

justice system began before the transformation of the country and its political roots are closely connected to those of the former anti-apartheid campaign, to the extent that some advocates for children's rights saw that campaign as a part of the greater goal of highlighting the injustices of the apartheid regime (Van Zyl Smit, 1999). The new dispensation under the Bill would see a reduction in the role of many state institutions in dealing with child offenders: fewer children would go to prison, fewer would go through formal court processes and there would be a reduction in the discretionary power of the prosecutor.

It would, however, be over-simplistic to say that the Bill diminishes the power of state institutions. Although it reduces the power of some institutions, it increases the power of others such as magistrates and probation officers, and creates some entirely new institutions such as Preliminary Inquiries, Child Justice Courts and One Stop Centres. Many voices within criminology have shown the dangers of the vision of crime being controlled by the community rather than by the state (Cohen, 1983). These dangers include co-option, net-widening, disguised coercion, thinning the mesh and dispersal of discipline (Cohen, 1983). Bottoms (1983) identifies four key features of such a dispersal of social control and these can be related to the Bill.

The first risk identified is that of blurring: a breakdown of the old and simple distinction between institutional and non-institutional (Bottoms, 1983). The Bill is deliberately and explicitly designed to blur distinctions. By allowing certain measures to be used either as diversions or as sentences it blurs the reach of the court; by creating one-stop youth justice centres it blurs the distinction between professional groups and by making diversion programmes (mainly facilitated by NGOs) the central part of the system it blurs the distinction between the state and non-state bodies.

A second risk is that of net-widening: increasing the total number of people who are in the system and drawing in less serious offenders (Bottoms, 1983). The Bill is not designed to do this; its aim is to provide alternatives to custody for children who are already in the system. However, as Cohen (1979) has outlined, in the criminal justice system benevolence has often gone wrong. Some American research has found that the

assumptions made about diversion were incorrect: it failed to prevent crime or reduce prison populations, merely formalising previously informal practices and eroding due process (Austin and Krisberg, 2002). There is a very real risk that one of the effects of the new regime of the Bill will be that children who might otherwise have received no intervention might be brought to a preliminary inquiry, thus drawing more children into the criminal justice system.

The third risk is that of thinning the mesh: community programmes may increase the amount of intervention directed at those in the system (Bottoms, 1983). It is undoubtedly true that many children will receive greater intervention than they otherwise would after the Bill is implemented, although this will not necessarily be due to a change in sentencing. It may be because under the previous system they were not being adjudicated at all. This is particularly true for children who commit sexual offences; before the Bill is implemented they are likely to pass through the criminal justice system without ever being held to account for their behaviour (Redpath, 2002). Un-sentenced children are spending time in prison and then experiencing their cases being withdrawn (Redpath, 2002). The creation of new diversion programmes, even prior to the implementation of the Bill, is deliberately intended to increase the intervention directed at many children.

The fourth risk is that of penetration (Bottoms, 1983); the idea that the formal social control networks in society are seen as penetrating more deeply into the informal networks of society. This, again, can be seen in the Bill, both in the partnerships between the state and NGOs and in the intended use of community groups to deliver some diversion programmes.

Much of the social control literature has its roots in Foucault's (1977) ideas of carceral discipline. Foucault envisaged people who offended not merely being punished by the state but trained or socialised so that they could become good citizens again. Some of these patterns can be seen in the diversion schemes introduced as part of the Bill in which children will be trained in life skills and rehabilitated.

Diversion in South Africa

In South Africa in 2001 the majority of children diverted were charged with minor property offences, such as theft, shoplifting and malicious damage to property. A small percentage of violent offenders was also diverted. Diversion programmes were generally used for first offenders; only 3.8% of children diverted had previous convictions (Muntingh, 2001a). The typical diversion programme participant is male, 15 – 17 years old, a first offender and in his second to third year of schooling. The compliance rate is high, between 80 – 91%, depending on the programme (Muntingh, 2001a).

Research into the effectiveness of diversion has so far proved difficult due to inadequate information systems, and the research that has been done has been based on the notoriously unreliable method of self-reporting. This, albeit limited, research has established positive results; most participants said that they had experienced positive personal change and only 6.7% of participants said that they had reoffended within a year of participating in the diversion programme (Muntingh, 2001a). More recent research found that 84% of participants said that they did not reoffend within a three year period from completing the programme (Mpuang, 2004).

The research demonstrates the dominance of prosecutors in the decision to divert; consistently over 80% of children diverted to NICRO have been diverted by prosecutors (Muntingh, 2001a). This figure combined with Mukwevho's (2001) findings that such prosecutorial decisions are sometimes made inconsistently and disjointedly, shows the significant status that an individual decision made by an often unaccountable prosecutor can have.

These findings will be put into some context later in the thesis. Unlike in some other jurisdictions, diversion in South Africa has not become associated with minimum or no intervention; it is expected that the diverted children will undergo sometimes very demanding rehabilitative programmes (Mpuang, 2004).

There has been some resistance within South Africa to the increased use of diversion (Wood, 2001). The current criminal justice system is prosecution-oriented and has a tendency to view diversion and other means of responding to children as soft options. The increasing crime rate has led to lobbying for harsher sentences for children accused of committing offences. Some organisations such as The Family Group Conference Centre and the Durban Centre experienced police, prosecutors and magistrates being very sceptical about the new approaches being suggested, particularly with regard to cases involving children accused of committing serious crimes (Wood, 2001). Probation officers often felt intimidated by the hostile responses that they received when suggesting diversion options to magistrates, and responded by making future recommendations based on what they thought the magistrate would find acceptable, rather than on what they believed to be appropriate for the child (Wood, 2001).

Diversion in South Africa is linked to rehabilitation, and that will be discussed in the next section.

Rehabilitation

The drafters of the Bill showed considerable confidence in the idea that child offenders can be rehabilitated and the attitudes to rehabilitation of the participants in this research informed their ideas as to how children should be dealt with. The Bill places a greater emphasis on rehabilitation than any previous South African legislation and, despite its novelty in South Africa, it can be placed within an international rehabilitative tradition. A consideration of the origins and use of rehabilitation provides insight into how it has come to play such a prominent part in the Bill. In this section, the international history and decline of rehabilitation will be considered, and rehabilitation will then be put into a South African context. The links between rehabilitation and other theories and perspectives will then be explored.

The Meaning of Rehabilitation

A rehabilitative approach is one that seeks to prevent crime through directly addressing factors believed to be the cause of crime with a view to reducing or eradicating the individual's offending as a consequence. These factors can be economic, social or personal. Rehabilitation is closely associated with the treatment model which seeks to work directly with the individual offender (McLaughlin and Muncie, 2001). Rehabilitation is linked to welfarism, in its desire to treat rather than punish offenders but Hughes (2001), in outlining the competing logics, draws the distinction that welfare can lead to broad based social strategies whereas rehabilitation is much more focussed on the individual offender.

Rehabilitation has always been an important motive in criminal justice reform efforts and its defenders describe it as one of the few resources that reformers have available to them in arguing for a more humane criminal justice system (Cullen and Gilbert, 1982).

The International Decline of Rehabilitation

An emphasis on rehabilitation occurs at a particular point within the history of a criminal justice system. Rehabilitation as a human right has been described as the final stage in four successive historical models in the history of rehabilitation, following the penitentiary, therapeutic and social learning stages (Rotman, 1990). In the United Kingdom, and other jurisdictions, the move from a purely punitive system to a more rehabilitative one occurred in the early part of the twentieth century.

Rehabilitation in the UK has gone through major changes in the last forty years, which can be summarised as a wave of pessimism followed by a return to cautious optimism (Chapman and Hough, 1998; Hughes, 2001; Pitts, 2002; Muncie, 2004). Kendall (2004) describes how the attack on rehabilitation in the 1970s came from a variety of sources including litigation, the civil rights movement, the questioning of authority, critical theory, postmodernism and feminism. It will be instructive for the purposes of

anticipating whether the Bill will be successfully implemented to consider the main criticisms that led to the demise of the rehabilitative ideal in the UK and USA.

The first of these criticisms was that a rehabilitative regime could inflict larger deprivations of liberty on its subjects than a punitive one (Allen, 1981). Just deserts theorists (Von Hirsch and Maher, 1992; Feld, 1999; Von Hirsch, 2001) expressed concerns that those subject to rehabilitation may be 'punished' disproportionately to the offence that they have committed. This criticism is linked to concerns about net-widening and mesh-thinning (Cohen, 1979). Disproportionate punishment combined with insufficient legal safeguards leads to a situation that is fundamentally unjust (Asquith, 2002). Offenders, whether children or adults, who do not respond to a rehabilitative disposal and then commit a further offence may find further rehabilitative options closed to them (Bell, 1999).

The second major criticism was that rehabilitation could become debased (Allen, 1981; Cohen, 1985). It can serve different ends than those that it was originally intended to serve and the language of rehabilitation has a tendency towards euphemism and obfuscation. Cohen (1985: 277) lists examples of euphemistic language associated with rehabilitation; one such example with particular resonance for children in South Africa is the use of the phrase 'correctional facilities' when what is meant is prison.

Thirdly, it is argued that children's rights are not sufficiently protected in systems that are based on rehabilitation or welfarism (Asquith, 2002). As it is not clear which methods of intervention help and which harm children, it is not appropriate to restrict their rights by imposing rehabilitative programmes on them without subjecting them to legal safeguards. The rehabilitative philosophy is seen as both theoretically shaky and practically unjust (Asquith, 2002).

The fourth and most devastating criticism levelled at rehabilitation was that it did not work (Martinson, 1974). Negative evaluations significantly contributed to the demise of the rehabilitative ideal and later, more positive results (Gendreau and Ross, 1987; Andrews *et al.*, 1990a, 1990b; Lipsey, 1992) led to the subsequent increase in

confidence. However, recent desistance theorists argue that even when rehabilitation is effective, it cannot provide an explanation for why people desist from offending (Maruna, 2001; Farrall, 2002).

Garland (2001:64) questions the conventional account of the decline of rehabilitation in the UK and USA during the 1970s and 1980s. He argues that the conventional accounts which refer to the negative evaluations by Martinson (1974) and others fail to acknowledge that empirically based challenges could have been resisted if the foundations of what he calls 'penal-modernism' had not been eroded in other ways. Garland (2001) argues that the decline must be seen within a political and social context. The next section will consider the context within South Africa and how rehabilitation could be received there.

Rehabilitation in South Africa

Rehabilitation is a relatively modern phenomenon in South Africa, particularly as promoted by government. The nature of the previous South African political system meant that the government largely ignored both rehabilitative trends elsewhere and liberal voices within the country, resulting in a retributive penal system remaining in place until the demise of apartheid (Van der Spuy *et al.*, 2004). The emphasis on crime control was replaced by one on children's rights and then rehabilitation itself began to emerge towards the end of the apartheid period (Van der Spuy *et al.*, 2004). The Child Justice Bill is just one example of the new rehabilitative paradigm: the Department of Correctional Services has also clearly stated an intention to take a more rehabilitative and restorative approach (Department of Correctional Services, 2004). The link between restorative justice and rehabilitation is discussed in the next section.

Rehabilitative programmes are central to the new child justice regime. There are three levels of diversion programmes and a child will be diverted to one of these depending on his or her needs, the offence that was committed and the previous record. Restorative justice is stated as an influence in the Bill, and the diversion options

available include family group conferences and victim offender mediation but rehabilitative programmes are most prominent. Classic rehabilitative programmes such as NICRO YES will be at the centre of the new dispensation; it is anticipated that following the enactment of the Bill there will be an increase in the already high number of children diverted through its programmes: 16 534 children were diverted between April 2003 and March 2004 (Mpuang, 2004).

The criticisms of rehabilitation outlined in the previous section can be applied to South Africa. In relation to South Africa the issue of greater deprivation of liberty is an important one but the starting situation is different. As previously stated, many child offenders are passing through the whole criminal justice system without receiving any intervention at all (Redpath, 2002). In addition the number of unsentenced children held in prison increased in the period 1996 – 2002, with a peak in March 2000 (Department of Justice, 2004b). So an increased use of rehabilitative programmes, at the diversion stage, may, at its best, alleviate both these problems, as there could be a better match between the child and the intervention. However, the risks that some children may be punished unduly and that those who do not respond appropriately to rehabilitation may be excluded from it in future are both real ones.

Skelton (1995) has argued that the diversion regime envisaged by the Bill for South Africa will provide adequate protection for the rights of children. Steps, such as involving the child and his or her parents in the process, providing adequate training for decision-makers and providing the possibility of appealing a diversion decision, will all provide protection and accountability. However as less than half of all children who appear before court are legally represented (Department of Justice, 2004b) there will continue to be a considerable number of children who will not be able to fully exercise their rights. It is difficult to say for certain how sufficiently the rights of children will be protected before the Bill is enacted, but it has certainly been an important consideration for those involved in drafting it.

Although South African Child Justice advocates claim that rehabilitative diversion programmes do work (Muntingh, 2001b; Wood, 2002; Mpuang, 2004) these studies

have been based on self-report and have often evaluated programmes targeted at children who may have already been unlikely to re-offend. As discussed above, the foundations of the children's rights approach are weak in South Africa which suggests that the new child justice regime would be vulnerable to negative evaluations. Whether such evaluations are likely will be discussed in the next section where the 'effective practice' literature is reviewed.

Connections between Rehabilitation and Other Theories

Internationally, rehabilitation is now rarely referred to on its own, as the concept has fallen out of favour. For example, Young (2003) describes the astonishment of British prison reformers at hearing the word 'rehabilitation' used by a British Home Secretary in 2002 as they thought that it had disappeared from political discourse. It would be more accurate to say, however, that rehabilitation has been updated and renamed so that it influences the current behaviourist interventions (Pratt, 2002). Rehabilitation is going through something of a resurgence and is now commonly discussed in conjunction with another discourse: children's rights, restorative justice or risk.

Firstly rehabilitation is linked to children's rights. Advocates for children's rights and supporters of rehabilitation are often seeking the same goals (Cullen and Gilbert, 1982:20):

Persistence of a strong rehabilitative ideology can be seen to function as a valuable resource for those seeking to move towards the liberal goal of introducing greater benevolence into the criminal justice system.

The attraction of rehabilitation for children's rights reformers is that it provides them with a valuable vocabulary with which to justify changes in policy and practice; it is the only justification of criminal sanctioning that acknowledges that the state has an obligation to do good for its charges (Cullen and Gilbert, 1982). The South African Child Justice Bill brings together the children's rights discourse with that of

rehabilitation. As discussed above, a children's rights approach based on the UN CRC, should lead to a welfare-oriented approach to child justice (Scruton and Haydon, 2002).

Secondly, rehabilitation is combined with restorative justice. An example of this is in the British youth justice system where rehabilitative programmes can follow a referral order, combining rehabilitation with restoration (Smith, R., 2003). The moves towards restorative justice in Scotland and Northern Ireland have precipitated the first moves away from a crime control model to a rehabilitative model for many years (Gelsthorpe and Morris, 2002). The links between restoration and rehabilitation are also present in the South African Child Justice Bill wherein a Family Group Conference or Victim Offender Mediation can be combined with a rehabilitative programme.

Thirdly, rehabilitation is linked to risk. Justifying rehabilitation through a framework of risk management has allowed rehabilitation to remain popular and to draw support from politicians, the general public and offenders themselves (Garland, 2001; Kemshall, 2003; Matthews, 2003). This has not happened in South Africa and the absence of an understanding of risk in the discussions of the South African Child Justice Bill could lead to the benefits of rehabilitation being overlooked and, thus, received by only a small number of children.

The advocates for the Child Justice Bill have rarely made attempts to explicitly justify a rehabilitative regime but they have made links between rehabilitation and children's rights, and rehabilitation and restorative justice. Labelling theory has been an influence but where the Bill departs from a straightforward outworking of that theory is in the measures that are put in place for children who are diverted. Arguments based on children's rights and restorative justice will allow rehabilitative programmes to be introduced but, as will be argued later, it may require an understanding of risk for rehabilitation to become available for a significant number of child offenders.

Restorative Justice

Considered internationally, the Child Justice Bill is extremely progressive and innovative in its incorporation of restorative justice into the formal justice system (Johansson and Palm, 2003). Although restorative justice can no longer be described as a new movement, and is popular throughout the world at a rhetorical level, to date it is only in a few countries that such an approach has been codified in legislation. New Zealand was the first, and for a long time, the only, country to include restorative justice provisions in legislation (Morris and Maxwell, 2003), but its increased popularity has led to other jurisdictions such as some Australian states (Moore and O'Connell, 2003) following that example. Restorative justice is a significant development in the internationalisation of criminal justice, in that it is one of the few ideas that can be seen to travel from developing societies to industrial societies, rather than the other way around (Karstedt, 2002).

The Bill goes beyond even the New Zealand legislation in that it provides two points in the process where a restorative justice approach can be taken, as a pre-trial diversion, or after conviction as an alternative to sentencing. In this section restorative justice will be defined and its influence on the Bill considered in terms of its links to rehabilitation, children's rights and African justice. The links between restorative justice and the criminal justice system will be considered, as will the influence of restorative justice values on the Bill.

Definition of Restorative Justice

Restorative justice is defined differently by different writers, and the term is sometimes abused, either to refer to any process involving a victim, any process involving rehabilitation or any process originating from a community rather than from the state (Johnstone, 2003). Johnstone (2002) identifies four ideas that characterise restorative justice. Firstly, crime is, in essence, a violation of a person by another person, and this is much more significant than the breach of legal rules. Secondly, the prime concern in

responding to crime should be to respond to victims' needs and prevent further victimisation by making offenders aware of the harm they have caused, and to prevent them repeating that harm. Thirdly the nature of reparation and measures to prevent reoffending should be decided collectively and consensually by offenders, victims and the community. Fourthly, efforts should be made to improve the relationship between the victim and the offender, and to reintegrate the offender and the victim into the community.

The Bill itself provides a statutory definition of restorative justice, for children, which, although more limited, is consistent with the ideas identified by Johnstone (2002):

The promotion of reconciliation, restitution and responsibility through the involvement of a child, the child's parent, family members, victims and communities.

Restorative Justice and the Child Justice Bill

Restorative justice has been a significant influence on the development of the Bill and in the provisions contained within it. In a similar way to other African countries, and in line with the recommendation of international instruments, the Bill starts with a statement of principles and objectives. One of these objectives refers to restorative justice:

2. The objectives of this Act are to –

...

(b) Promote ubuntu in the child justice system through –

...

(iii) Supporting reconciliation by means of a restorative justice approach.

To comply with this, the Bill makes specific provision for the use of family group conferences, victim offender mediation and other restorative justice provisions at all stages of the criminal justice process (Skelton, 2002b). Restorative justice processes can be used as a diversionary measure or as a sentence; for minor and serious offenders; for first time and repeat offenders; and having previously participated in a restorative

justice process will not be a barrier to being allowed to participate in another. Significantly, an earlier draft of the Bill did not seek to provide an exhaustive list of possible restorative interventions; it encouraged local communities and NGOs to devise their own interventions (SALC, 1996). However, the provision that allowed the court to use non-specified, community restorative justice programmes was removed from the subsequent draft of the Bill. The Chair of the Department of Justice Portfolio Committee, defending this decision, said that it was too vague a provision to be of use (PMG, 2003d:3).

Restorative Justice and Children's Rights

The debate between those who advocate for greater or lesser state involvement in restorative justice crystallises around the issue of offenders' rights and the debate about whether restorative justice interventions preserve those rights (Skelton, 1999; Braithwaite, 2002; Smith, D., 2003; Skelton and Frank, 2004). The legal rights of alleged and convicted child offenders in South Africa are protected by the Bill, necessitating a significant involvement of state officials, such as defence lawyers and probation officers. This involvement is seen by some restorative justice advocates as diminishing the possibility of community re-integration and essentially non-restorative (McCold, 1999).

It is clear from the Bill that power within the child justice system will still remain with the state and with criminal justice professionals. The responsibility for protecting the due process rights of children will remain with the state (Skelton, 1995). The initial drafters of the Bill did not demonstrate the anxiety about the trustworthiness of the community that is apparent in Northern Ireland; another transitional society that is introducing restorative justice measures (Gormally, 2001; McEvoy and Mika, 2002). Earlier drafts of the Bill did allow for initiatives to originate from the community, facilitating the emergence of community based restorative justice and diversion schemes (SALC, 1996). The changes to this provision by the Portfolio Committee (PMG,

2003d) suggest that the restorative justice regime in South Africa is likely to follow an international trend of maintaining the role of the state in administering justice.

The emphasis on diversion in the Bill is closely linked to the intention to give communities a greater stake in the criminal justice process (Skelton, 2001). This is particularly true with regard to restorative justice, which is an integral part of many of the diversion options. It is acknowledged, however, that involving communities is not necessarily restorative, and that care must be taken to ensure that diverted children do not lose all procedural safeguards (Skelton, 2001: 8):

We therefore must build in some measures to re-educate communities, and processes involving communities must be carefully managed and monitored.

The intention to retain state control of restorative processes may help to protect the procedural safeguards of children, but at a possible cost of restricting the ability to be flexible and to respond to community needs.

Restorative Justice as a form of rehabilitation

Restorative justice perhaps owes a lot of its popularity to its ability to appeal to all sides of the traditional debate in criminal justice and the disposal of offenders. Those who support rehabilitation, those who support retribution, those who advocate the rights of victims and those who advocate the rights of offenders are all able to promote restorative justice (Johnstone, 2003).

Restorative justice claims that the process of requiring offenders to confront their victims is sufficiently uncomfortable to satisfy most proponents of punitive measures. Reintegrative shaming, defined as strongly disapproving the act while not rejecting the individual (Braithwaite, 2003a), is an important theoretical foundation of restorative justice. The frequent use of the word 'shame' or 'shaming', even when prefaced with 'reintegrative', allows the retributivists to feel that their form of justice is being done. Restorative justice can also justifiably claim to be rehabilitative. Rehabilitators can be

satisfied by the promise of the decrease in the use of imprisonment, the increased involvement of the offender's family and the requirement for the offender to give consent at every stage of the process.

As previously discussed, the Bill links restorative justice with the rehabilitative tradition. It makes explicit that restorative justice is designed to be a measure that rehabilitates children and does not interfere with their human rights. The South African Constitution protects children from facing any punishment that is violent, or a violation of their human rights. Restorative justice does claim to be an appropriate intervention for all offenders, not just minor and first-time offenders (Hagemann, 2003; Bazemore and Umbreit, 2003; Walgrave, 2003), but it will not be used in that way in South Africa. There is a debate within restorative justice regarding whether it should be backed up by a punitive regime, or whether that would contradict core restorative values (Braithwaite, 2003b; Levrant *et al.*, 2003). In South African child justice a child that continues to offend after a restorative intervention will eventually be dealt with punitively. The South African Law Commission (SALC, 2000b) made clear that some serious child offenders would be excluded from the restorative justice and diversion elements of the Bill while those children who are dealt with by the Bill itself can expect rehabilitation, not punishment.

Restorative Justice as Indigenous African Justice

The advocates of a child justice system based on a children's rights approach make the suggestion that the use of restorative justice will help to achieve that. It is also claimed that restorative justice is a form of indigenous justice and that its introduction will be a way of integrating indigenous African justice with the formal legal system (Van Eden, 1995; Makhateni, 1996; Consedine, 1999; Tutu, 1999b; Skelton and Frank, 2001; Christie, 2003). It is contrasted with a retributive criminal justice system, "imposed ... by the former colonizers" (Stern, 1999: 239). Consedine (1999) and Van Eden (1995) provide examples of traditional African problem-solving that is restorative and satisfies all parties to the conflict (see also Allot, 1977). However, it does not necessarily follow

that a justice system that makes use of traditional African approaches and gives power to the community will always be restorative and promote the rights of children. Competing claims are made about the nature of African traditional justice, for example by vigilante group 'Mapogo a Mathamaga' (hereinafter known as Mapogo).

Mapogo was set up in the Northern Province in 1996 as an anti-crime group or business shield but is now better known as a vigilante group due to its violent methods in dealing with criminal suspects. The South African media reports that it is rare for a week to go by without one of Mapogo's 100 branches beating up a suspected criminal (Ngobeni, 2001). The beatings usually take place in public, and large *sjamboks* are used (Ngobeni, 2001). Mapogo makes similar claims to the restorative justice advocates to be dispensing distinctive African justice and describes African justice as placing an emphasis on instant justice for the victim, without a Western preoccupation on investigation and cross-examination (Von Schnitzler *et al.*, 2001). Mapogo has received support for this view from local traditional healers and leaders (Von Schnitzler *et al.*, 2001). The organisation describes corporal punishment as being sanctioned by the ancestors and the only way to restore order and morality in communities. The Provincial Chairperson of the Northern Province Congress of Traditional Leaders also supports Mapogo, saying that corporal punishment is synonymous with African Justice and that the concept of rights is foreign to Africans.

Whether the intention is to seek a restorative approach or to advocate for the return of corporal or capital punishment, claims to represent traditional African justice are extremely problematic. There is no one African justice, just as there is no one African culture, but as many ideologies and traditions as there are tribes (Costa, 1998). To add to this diversity there is the complication that many African cultures have oral rather than written traditions, making any claim to historical veracity difficult to check (Costa, 1998). Attempts to link restorative justice to indigenous justice have been criticised as an appropriation of indigenous justice to strengthen advocates' position (Blagg, 1997; Tauri, 1999; Cain, 2000; Daly, 2002). Statements such as the one referred to above that a particular approach is sanctioned by the ancestors can have an extremely persuasive force, but are, by their nature, impossible to verify. Consedine's statement that African

justice is “reconciling and healing”(1999:169) and Mapogo’s philosophy that corporal punishment without due process is an African solution to crime appear to be diametrically opposed but are probably both grounded in some truth.

As discussed above, restorative justice can become an extremely important part of the South African Child Justice system, and can provide many benefits for victims, offenders, criminal justice professionals and the community (Skelton, 2002; Mbambo and Skelton, 2003). However, care should be taken in making the assumption that an approach that gives greater involvement to victims and communities is necessarily synonymous with the promotion of children’s rights. Equally, it would be wrong to assume that a restorative approach that does promote the rights of the child will necessarily meet the needs of the community in all cases, or reflect their ideas of what traditional justice is. The adoption of the United Nations Economic and Social Council (UNESCO) Basic Principles [or Vienna Declaration] (UNESCO, 2002) on restorative justice would alleviate the concerns of those worried about human rights abuses, as these principles advocate consent, fairness and safety as part of the restorative process (UNESCO, 2002). However this might also result in the loss of some claims to tradition and community leadership.

Concerns about how well the rights of children would be protected by community-based restorative justice interventions may have been an influence in the Portfolio Committee’s decision to leave oversight power with the court.

Restorative Justice Values

It is restorative values that have the greatest influence on the Bill. There has been criticism of restorative justice in some jurisdictions to the effect that the terminology has been misapplied and that allegedly restorative processes have been used that bear little relation to the values on which restorative justice is based (Braithwaite, 2002; Johnstone, 2003). These examples include children being painted white, as well as instances of children being threatened with violence or exclusion from their home areas

if they do not attend a family group conference, or children being forced to wear stigmatising signs or t-shirts as a result of such a conference. Advocates of restorative justice argue that it has become so popular that many programmes which have little in common with the original restorative justice ethos have taken on its label (Johnstone, 2002). The weakness of seeing restorative justice merely as a process is that even interventions that produce further trauma might be considered restorative (Johnstone, 2003).

In South Africa, there has been a tendency to attempt to acquire the values of restorative justice prior to learning techniques and processes, such as the contacting of offenders and victims, or the skills of conference facilitation. This can be seen in the legislation and in the development of projects already described (Mbambo and Skelton, 2003). It can also be seen in the positive participation of South Africa in developing the relevant international instruments (UNESCO, 2002).

The Relationship Between Restorative Justice and the Criminal Justice System

In the early stages of the restorative justice movement the advocates of the approach anticipated that it could replace the existing criminal justice system (Johnstone, 2003; Daly, 2002). It was standard practice for restorative justice advocates to begin their arguments with a detailed criticism of the current retributive approach. McElrea (1994:34) put it succinctly:

Crime rates keep climbing and prison populations keep growing. The needs of neither offenders nor victims are satisfied. The existing theoretical bases of punishment seem bankrupt.

There was an evangelistic zeal to sweep away the old system and replace it with something new, radical and effective. In South Africa there was no shortage of zeal, but the arguments were different; there was no discredited child justice system to sweep away (Skelton, 2002). The coincidence in time between the creation of the new

democratic South Africa, the Truth and Reconciliation Commission, the campaign for new child justice legislation and the worldwide popularity of restorative justice allowed restorative justice to be easily incorporated into the draft Bill (Skelton, 2002). As the Bill allows restorative justice to be used at every stage of the system, and with both minor and serious offenders, it could be argued that it has superseded the retributive model in South Africa. Considering that it was only in 1996 that the Constitutional Court finally abolished whipping as a means of punishment, the Bill could be seen as a significant victory for restorative justice advocates.

Two notes of caution should be sounded, however. Firstly, as previously stated, restorative justice is only to be provided for child offenders. The vision of many restorative justice campaigners was that it should be used to supplement the existing criminal justice system, and then, as its benefits became apparent, it would start to become the presumptive disposition with trial and punishment the exception (Johnstone, 2002). In South Africa this vision could be achieved by restorative justice becoming dominant within child justice, and then spreading to the mainstream criminal justice system. Despite the prevalence of high profile restorative approaches, in the Bill, the Truth and Reconciliation Commission (Asmal *et al.*, 1997; Tutu, 1999a; Boraine, 2000) and township peace committees (Roche, 2002, 2003), and the recommendations of the SALC (2000a), the retributive model remains the dominant way of dealing with adult offenders. Considering the length of time that it has taken to implement the Bill it is unlikely that restorative justice will be widely used with adult offenders for some time to come.

Secondly, as previously stated, the Bill is yet to be implemented. Until such time as the Bill is introduced, restorative justice and child rights advocates should be wary of celebrating anticipated victories. Pitts (2003) expresses concern about the use of restorative justice in the UK, that such an essentially progressive measure may be located at a place in the sentencing tariff that continues to allow many child offenders to be incarcerated. This risk remains very real in South Africa too as, under the dispensation of the Bill, some children may well be excluded from the restorative and rehabilitative regime.

It appears that the South African system neither expects restorative justice to replace nor supplement the existing system, but to take a third way, a parallel track (Skelton, 2002b). There is an implicit acknowledgment in that view that retributive justice, for all its faults, will remain the dominant approach in the criminal justice system.

Restorative Justice and Victims

Perhaps the greatest weakness in the understanding and implementation of restorative justice in the Bill is the limited way that it provides for the needs of victims. This may not necessarily be a failing of the Bill itself, but may be a consequence of the lack of similar reforms in other areas of the criminal justice system. There is a victims' movement in South Africa, but it is localised and fragmented, and often the interests of victims of crime appear to be used to as a device to make wider political points about the failings of the South African government. Despite commitments from government many victims receive very little support, and any services that do exist tend to be delivered to victims of sexual assault or domestic violence (Lutshaba *et al.*, 2002).

The issue of the protection of victims is of particular significance in cases of sexual assault, and recent South African research (Dissel, 2004) provides disturbing evidence that some victims may be re-victimised by Victim Offender Conferences. Dissel's (2004) research uncovered one case where a 15-year old girl withdrew her complaint of rape at a conference where she did not appear to be offered appropriate support and advice, and a second case where the offender's parents verbally abused the victim. These examples highlight the need for conferences to be facilitated by appropriately trained staff, under supervision.

Restorative justice in the Bill has originated from an offender's perspective and specifically a child rights perspective. While the interests of the victim are by no means neglected, and there is an overlap between the groups of offenders and victims (Wedge *et al.*, 2000), the Bill was drafted with the needs of child offenders in mind and the

impetus for child justice law reform sprang originally from concern about the plight of children in prison during apartheid (Sloth-Nielsen, 1999a). Most of the writers on restorative justice in South Africa are child justice specialists; writing from a victim perspective is much less common. However, focussing on the human rights of offenders while neglecting the needs of victims, could service a popular or governmental willingness to retreat from a commitment to human rights (Simpson, 1996). If the implementation of the Bill is to be truly restorative it will need to contribute significantly to the process of remedying this.

The Future of Restorative Justice in South Africa

Haines (1998) argues that restorative justice appeals to a wide basis of support, not by unifying opinion across a broad social spectrum of views, but by sustaining sometimes contradictory values and objectives. One of the defining characteristics of the worldwide movement to advocate for the greater use of restorative justice has been its claim to achieve these apparently contradictory objectives by being both ancient and modern, by meeting the needs of both victims and offenders or by being both punitive and rehabilitative. It appears to be easier to manage these conflicts at a theoretical level than at a practical one and the implementation of legislation will require greater clarity.

It would be an over-simplification to claim that South Africa has come down on one side or another in each of the debates within restorative justice (Stout, 2003a). However, to summarise, the Bill appears to favour a model of restorative justice that is value-led, rehabilitative, offender-oriented, following a parallel track to the criminal justice system and incorporates elements of both the ancient and the modern, the community and the state. The analysis of the data gathered in this research will demonstrate how restorative justice affects the practical decision-making in the decision to divert.

Managerialism

Although the most prominent discourses in the development of the Bill and the advocacy for it have been those of restorative justice, children's rights and diversion, the development of the new legislation has also been influenced by managerialist considerations (Sloth-Nielsen, 2003a). Managerialism combines an economic quest for greater cost efficiency, generally borrowed from the private sector, with the political objective of more effective social regulation (James and Raine, 1998; Cavadino and Dignan, 2002). Managerialism is distinguished from management, which is the balancing of resources to achieve certain goals (James and Raine, 1998). It redefines social issues as problems to be managed rather than resolved (Muncie, 2000; Pratt, 2002). Managerialism is associated with actuarial justice that replaces traditional goals, such as rehabilitation or deterrence, with the pursuit of efficiency (Kempf-Leonard and Peterson, 2000).

Sloth-Nielsen (2003a) argues that the Bill has been influenced by corporatist and managerial concerns, much more so than is usually acknowledged, and that a managerialist emphasis will be an important aspect of both securing parliamentary approval and achieving successful implementation of the Bill, particularly considering that previous reform initiatives have failed due to poor management (Van der Spuy *et al.*, 2004). She suggests that the Bill's intentions to structure discretion and to insist upon the registration of diversion programmes are examples of this management impulse.

Managerialism can be linked to the other discourses that influence the Bill, sometimes in a way that complements these other discourses, and at other times in way that seems to conflict with them. It has been argued that managerialism, and its outworking in actuarial justice, conflicts with a rights-based approach by emphasising social control and the management of conflicts and problems above the challenging of the inequalities that gave rise to such situations in the first place (Cohen, 1985; Kempf-Leonard and Peterson, 2000; Smith, R., 2003; O'Malley, 2004). However it is also argued that managerialism can provide another alternative to either a rights-based approach or one

that is merely punitive (Cavadino *et al.*, 1999). Providing that managerialist impulses are used in pursuit of human rights-based aims, they should not threaten either a rehabilitative or a rights-based approach (Cavadino and Dignan, 2002). Garland (2001) suggests that restorative justice might comply with a managerialist agenda as it has the potential to save the state money. However, managerialism is perceived by some (Crawford and Newburn, 2002; Crawford, 2003) as a threat to the principles of restorative justice (Crawford and Newburn, 2002: 492):

The managerialist impulse allows little space for the human, expressive and emotive aspects of criminal justice. As a consequence, it tends to downplay questions of party involvement, fairness, legitimacy and public confidence.

It is inevitable that there will be a greater emphasis on administrative efficiency, cost-effectiveness and evaluation in child justice if and when South Africa moves from developing legislation to implementing it. The efficiency model, using the language of business and management, has replaced the more idealist language of restorative justice and children's rights (Sloth-Nielsen, 2003a). There is clearly a need for proper management of the system, if not necessarily for managerialism. Indeed, the Bill will not be implemented until its costs have been anticipated and planned for across all relevant government departments (ICCJ, 2002; De Lange, 2004; Van Der Spuy *et al.*, 2004). If the reforms contained in the Bill are to be defended, then those implementing them will need to anticipate questions about effectiveness and to ensure that new programmes are based on findings from the available research and, once implemented, are carefully monitored and evaluated. There is a danger if this does not happen that the regime will lose credibility. There is a further danger, however, that a regime based on diversion which is not properly managed may lead to net-widening: the bringing of too many extra children who have committed minor offences into the system (Cohen, 1979; Pitts, 2003).

In the UK and other jurisdictions, managerialism is often associated with risk and effective practice and those two discourses, largely absent from discussions of the Bill, will be discussed in the next section, after the final major influence on the Bill, work with child sex offenders, is described.

Child Sex Offenders

As can be seen from the account of the Portfolio Committee deliberations and the description of the child justice projects, the need to address the behaviour of children who sexually abuse other children has been a significant theme in the planning of the Child Justice Bill. Those who have been advocating most strongly for the Bill have also been involved in the development of programmes for children who commit sexual offences. It is possible that in the area of child sex offenders some of the greatest difficulties in translating the intentions of the Bill to practice will be encountered.

This section will consider the particular context of child sex offending in South Africa and the way in which the Bill can be expected to address such offending.

Definition

Ryan and Lane (1991:3) define a sexual offence committed by a child as any sexual act carried out by a person under the age of 18:

With a person [the victim] of any age (1) against the victim's will, (2) without true consent, or (3) in an aggressive, exploitative or threatening manner.

This definition is used by SAYStOP (Wood and Ehlers, 2001), the main organisation working with child sex offenders in the Eastern and Western Capes, so it will also be accepted for the purpose of this thesis. The definition of a child as someone under the age of eighteen is contained in the Bill.

South Africa's Culture of Sexual Violence

Although it is difficult to establish definitively the extent of adolescent sexual abuse nationally in South Africa, it is clear that it is a national problem.

Analysis of the Department of Correctional Service's national data, during the period 1998 – 2001, found that since 1999, the number of children sentenced for sexual offences in South African prisons was decreasing, while the number of un-sentenced children in custody for sexual offences was increasing (Redpath, 2002). In March 2001, there was a total of 525 children who had committed alleged or proven sexual offences in custody; 314 unsentenced children, and 211 sentenced children (Redpath, 2002). The research revealed that erratic management practices were adopted in cases involving children alleged to have committed sexual offences. Many prosecutions are unsuccessful and few children are diverted from the criminal justice system. Redpath (2002) concluded that the provisions of the Bill would be appropriate for this group of children, and that the greatest need was for better management of such cases.

Despite the difficulties in acquiring definitive figures, it is clear that the young men in South Africa charged with or convicted of sexual offences represent a very small percentage of the total adolescents engaged in sexually abusive behaviour (Redpath, 2003). Research has shown that girls and young women in South Africa are subject to a significant degree of sexual violence, often from their peers. A comprehensive study of sexual violence in South Africa was carried out by international research group CIETafrica in 1998 (Andersson and Mhatre, 2003). The organisation describes South Africa as possessing a 'culture of sexual violence' (Andersson and Mhatre, 2003:1); it found that one in five South African women reported being victims of sexual violence. CIETafrica found that few of these incidents ended up in convictions, despite the police being informed by most victims (Andersson and Mhatre, 2003).

Other studies suggest that this violence starts in childhood, at the hands of other children. A Medical Research Council (MRC) study (Wood *et al.*, 1996) among Xhosa speaking adolescent women in the Khayelitsa region of Cape Town found that male violence against women was endemic and dominated sexual relationships. Human Rights Watch (2001) found that the greatest threat to a South African's girl's safety at school is likely to be seated next to her in class. There is a significant problem with teachers abusing students, but a South African girl is more likely to be sexually

assaulted by one (or usually more than one) of her classmates than by a teacher (Human Rights Watch, 2001). South African children's charity, Childline (Van Niekerk, 2003) estimates that 43% of all sexual crimes committed on children and reported to Childline are committed by other children.

Characteristics of South African Children who Commit Sexual Offences

The 2000 SAYStOP study (Wood *et al.*, 2000) is one of the few studies conducted on a South African population of young sex offenders. That study of twenty male sex offenders, between seven and fifteen years old, found that this group shared many characteristics with sex offenders in other countries, including the commission of a previous sexual offence; perpetrators were known to their victims; most offenders came from backgrounds characterised by violence and substance use and the sexual offences were likely to be the start of a developing pattern of behaviour, rather than one-off occurrences. Characteristics particular to the South African group included that they were less likely to be socially isolated and that they were frequently exposed to aggressive and sexual behaviour within their communities.

Although the authors do not highlight this as a distinctly South African feature their findings regarding the exposure of young sex offenders to violence are striking. They found that eighty per cent of participants had regularly witnessed violence in their communities and that over a third of the sample had witnessed someone being murdered. These findings correlate with Wedge *et al.*'s (2000) findings that 84% of young serious offenders in their South African study had experienced significant loss that reflected the consequences of violence and family disruption following apartheid.

While the area of child sex offenders remains under researched in South Africa there has been significant worldwide research on the subject, and many reviews of the literature. For example, Harris and Staunton (2000) review the literature relating to young male sex offenders and suggest that there are six main factors leading to sexually

aggressive behaviour in adolescent boys: family environment; attachments and social development; psychological disturbance; history of sexual abuse; pornography; and the societal and cultural context. The limited research that has been done suggests that the antecedents of child sexual abuse in South Africa are broadly similar to those in other countries (Wood *et al.*, 2000).

Treatment of Child Sex Offenders in South Africa

As previously stated, the treatment of child sex offenders in South Africa is carried out through diversion programmes; there is little or no treatment offered to sentenced offenders either in custody or in the community. As there has been little research carried out into child sexual offending in South Africa the programmes are based upon selected international research findings (Wood and Ehlers, 2001; Stout, 2003b). There is, however, a commitment to working with this group of children in South Africa. A United Nations Development Project workshop to consider the issue was held in Pretoria in April 2002 and was well attended by representatives of government and NGOs.

Lack of accurate statistical information has been a significant obstacle to establishing a diversion programme in rural South African locations, such as the Eastern Cape. In that area, local magistrates had communicated to NICRO that there were many adolescent sex offenders that they were unable to deal with appropriately. NICRO responded to this by investing time and resources in training their staff in the SAYStOP programme, but then found that there were insufficient referrals to run groups (Cagwe, 2002).

It is clear to see that there has been a convergence between the goals of practitioners working with child sex offenders and those campaigning for the implementation of the Child Justice Bill. The desire to run diversion programmes with child sex offenders has been one of the driving forces behind the campaign to ensure that the Bill does not merely allow minor and first-time offenders to be diverted. As has been discussed in

the account of the Portfolio Committee's work, the debate about whether diversion is suitable for high-risk offenders has also focussed on child sex offenders.

Work with child sex offenders is the sixth of the major influences on the Bill, and links with the influences of children's rights and rehabilitation. The preceding section has considered the main influences on the Bill, and criticisms that can be made of these theories and ideologies. The final section of the literature review will consider two discourses that have not been influential in the development of the Bill but can assist in understanding its implementation. Youth Justice in the UK has been characterised in recent years by discussions of risk and effective practice but these do not appear to have been considered in debates about the Bill. These discourses will be considered, along with their limitations and their possible applications to South Africa.

Risk

The Risk discourse is at the centre of penal policy and probation practice in the UK but is not currently considered in relation to child justice in South Africa. This section will briefly consider how risk came to be so important in the UK, then consider what an emphasis on risk assessment means and finally put the discussion of risk into a South African context.

Kemshall (1998a) traces the historical development of probation practice in the UK. Probation work had its roots in missionary work, so assessment was often an assessment of moral worth rather than being based on any form of expert knowledge.

The missionary ideal was replaced by that of a scientific social work which diagnosed problems and identified barriers to change (Kemshall, 1998a; Goodman, 2003). Offenders were now the recipients of a professional service which led to increased coercion of offenders in the community and their increased objectification. This provided the foundation for a managed approach to assessment and allocation of resources from the late 1980s. Throughout this time the role of the probation officer changed from that of the offender's friend to a provider of treatment.

The demise of the rehabilitative ideal in the late 1980s led to an increased view of probation supervision as a form of restriction and control, rather than as a vehicle for treatment (Kemshall, 1998a). Penal policy was increasingly concerned with the separation of the dangerous from the non-dangerous and an emphasis on assessment. This coincided with an emphasis on management and on effective practice which will be described in the next section.

The process culminated in the 1991 Criminal Justice Act that established clear principles for a risk penalty. This Act emphasised the desirability of risk being assessed in all cases. Since then, risk assessment and management have, along with effective practice and managerialism, dominated probation work with offenders (Kemshall, 1998a).

The idea of risk that emerged as central to the criminal justice system and to the work of criminal justice professionals in the 1990s (Kemshall, 1995) has two dimensions: the likelihood that an offence will occur and the possible impact if such an offence does occur. Both the sentence that an offender will receive and the way that they are to be managed in the community, if they are permitted to remain in the community, are affected by the risk that they pose, so mechanisms for assessing that risk have been developed. The services provided to offenders are determined by the assessment of the level of risk posed. The so-called 'risk principle' suggests that resources should follow risk and the most intense programmes should be targeted at those who present the greatest risk (Merrington, 2004). As noted earlier, Kemshall (1996) found that, prior to the introduction of actuarial measures, probation officers were making decisions about risk in an unsystematic way related to their perceptions of their own role and to their values and beliefs. There was often a conflation, both in probation practice and in criminal justice policy, between danger to the public and persistent, minor offending, which could lead to disproportionate sentencing (Kemshall, 1998a). Now, probation officers are expected to utilise both clinical and actuarial risk measurement instruments and there is a new emphasis on judging their performance by targets (Webb, 1996). The

use of these actuarial risk assessment methods was accompanied by optimism about the possibility of changing the behaviour of the most persistent offenders (Robinson, 2002).

Management of offenders is also affected by how their risk is assessed, with probation officers expected to reduce both the risk of recidivism and reduce the risk of harm (Kemshall, 1998b). Although the influences discussed in the first section of this review (human and child rights, rehabilitation, restorative justice and diversion) are present in British criminal justice, issues of risk dominate these other influences. Youth Justice has been transformed into a process where the main objectives are to reduce risk and expenditure (Goldson, 2000).

In South Africa, none of the programmes designed as diversions for child offenders requires an actuarial risk assessment to be carried out, and there are no indications that practitioners have been trained to enable them to perform clinical risk assessments. Although chapter 4 of the Bill deals with assessment there is no mention of risk either there or in section 38 of the Bill that also deals with assessment. Risk assessment follows a clinical approach that relies on practitioner judgement. Such an approach is characterised by Bonta (2004:64):

The assessor sits down with the offender, has a nice little chat with him or her, maybe reads some notes and files, and at the end of the day says, "In my professional opinion, I think the guy is high risk, or medium risk, or whatever" ...It really is an unstructured collection of information.

The emphasis on risk in child justice in other jurisdictions has been subject to criticism, and it should not be uncritically applied to South Africa. Risk calculation can be discretionary and subjective, merely creating an illusion of objectivity and efficiency (Shaw and Hannah-Moffat, 2004). It can lead to the creation of a system that is more concerned about risk management than about justice (Hudson, 2001). Goldson (2004) argues that it has a tendency to lead to intensive interventions at an early stage based on what can be quite unreliable predictions about future behaviour; administrative processes can become more important than justice. It may be difficult to reconcile a risk emphasis with restorative justice (Shearing, 2001). However, just as the adoption of risk was a 'pragmatic' response by probation to the new penalty in the UK

(Kemshall, 1998a: 92) it could be equally practically used by child rights activists in South Africa to respond to calls for more punitive responses. Notwithstanding the criticisms of the emphasis on risk, considerations of risk do allow work to be carried out with serious and persistent offenders (McGuire and Priestley, 1995; Moore, 2004; O'Malley, 2001). Rehabilitation is increasingly discussed via a risk framework, rather than one of welfare (Garland, 2001; Kemshall, 2003).

Effective Practice

Before discussing how the effective practice criteria are met in South Africa the principles will be outlined.

The principles of effective practice, which are also sometimes described as the 'What Works' principles are informed by the findings of meta-analysis conducted by Andrews *et al.* (1990a, 1990b) and Lipsey (1995). These findings provide practitioners and programme designers with clear guidelines as to the interventions that are effective with offenders in reducing re-offending and in the United Kingdom government guidelines measure criminal justice interventions against the 'What Works' principles (Chapman and Hough, 1998).

'What Works' research concluded that there are six features that appear to distinguish effective from ineffective interventions (Chapman and Hough, 1998; Mackenzie, 2002). Firstly, there is classification of risk so that offender risk and the degree of intervention are matched. Secondly, criminogenic need should be targeted, and programmes should focus directly on behaviour relating to offending. Thirdly, programmes should meet the responsivity principle in that the style of the programme should match the style and needs of the offender. Fourthly, programmes should be based in the community. Fifthly, programmes should be multi-modal, using a variety of methods to address the variety of offenders' problems, including cognitive behavioural methods. Izzo and Ross (1990) found that programmes based on cognitive therapy were twice as effective as those using other approaches. Sixthly, programmes

should be run with integrity; they should be properly managed, use trained staff and be run with clearly identified aims and objectives which are adhered to consistently.

South African child justice programmes have not heeded all the lessons to be drawn from research done in the UK, Canada and USA in recent years (McGuire, 1995; Lipsey *et al.*, 2004). Few, if any, South African programmes are targeted at serious or repeat offenders and others struggle to maintain programme integrity. Smith (1999) has described how British youth justice workers in the 1980s were able to implement effective interventions, even though the language of effective practice was not available to them, and they did not routinely evaluate their work. It is possible that this is true in some South African diversion programmes, but there is little evidence of any programmes targeting higher risk offenders.

There is a danger in South Africa that future evaluations might find that programmes do not address the behaviour of serious offenders, and that it is impossible to guarantee their effectiveness in working with less-serious, first time offenders as many in this group will not re-offend anyway, regardless of intervention. As discussed in the first part of this review, the Portfolio Committee has already expressed grave concerns about the SAYStOP programme, and this has led it to suggest more serious interventions for child sex offenders (PMG, 2003o). Future negative evaluations of programmes could lead to a more punitive response to child crime in general.

Although it is important that South African practitioners consider how the work that they do should be made effective, and how international lessons should be applied, it would not be appropriate to simply impose methods that have been shown to be effective in other jurisdictions on to South Africa. Worrall (2004) has described the issues raised in imposing interventions based on the 'What Works' research on to work with Aborigines in Australia: these include that they are too focused on the individual, they ignore family obligations and they focus on perceived cognitive deficits rather than structural issues. Similar and different issues would be likely to be raised by such an imposition on South Africa. In addition, the principles of effective practice are not universally accepted even in the jurisdictions that they originate from. It has been

argued that they are based on partial, potentially discriminatory research (Shaw and Hannah-Moffat, 2004); they are overly focussed on cognitive-behavioural techniques to the point where they ignore structural issues (Kendall, 2004); that too much is claimed for them (Pitts, 2001); that they lead to too great a faith in particular programmes to the exclusion of other aspects of practice (Farrall, 2002; Goldson, 2004; Kemshall *et al.*, 2004); and that the research on which they are based was not as conclusive as is claimed (Mair, 2004). Basing interventions on research carried out in other jurisdictions needs to be considered in the awareness that the research might be reliant on culturally specific theory or methodology (Rashid, 2000). In light of all these factors, it would be unwise for South Africa merely to import programmes that are claimed to be effective from other jurisdictions. Nevertheless, the language of effective practice has allowed work to be carried out in community settings with serious and persistent offenders (McGuire and Priestley, 1995; Moore, 2004) and there may be elements that South African child justice reformers can extract from it. It has allowed proponents of rehabilitation to argue convincingly in favour of such approaches (Lipsey *et al.*, 2004; Raynor, 2004). It is important to distinguish the principle of assessing effectiveness from particular interventions that have become associated with effective practice in other jurisdictions. It should be possible to work effectively with serious and persistent child offenders in the community in South Africa, but it does not necessarily follow that cognitive behavioural programmes are the way to carry out this work.

Conclusion

The discourses of risk and effective practice were not evident in the information provided by the respondents in this research, and these subjects will be returned to in detail in the conclusion. In the literature review there has been a portrayal of different theories, ideologies and discourses that have influenced the Bill: children's rights, diversion, rehabilitation, restorative justice, managerialism and attitudes to child sex offenders. These could be understood as influences on the way that practitioners interpret individual cases and, in the analysis of the data, they will be used as themes to organise and understand the data. The use of discretion will also be considered in

relation to whether each professional group makes decisions in different ways and whether individuals are influenced by their own values or prejudices.

The literature review has considered the South African Child Justice context, the theories that influence the Bill, and theory that might be of benefit to the future of child justice in South Africa. An analysis of the decision-making of South African criminal justice professionals will be carried out in the later parts of the thesis. Prior to that, in the next chapter, the methods used to answer the research question will be outlined.

METHODS

The question investigated in this research is the way in which the Child Justice Bill's proposals appear likely to affect the process of diversion from prosecution for children. To answer that question it was necessary to discover how discretion would be exercised by the professionals participating in the preliminary inquiry.

This chapter will outline the methods used in attempting to answer this research question. It will start by justifying and explaining the methods chosen, including a discussion of epistemological issues. This will be followed by a description of who the subjects were and how they were chosen. Then the analysis of the data will be described and the methods used will be justified ethically. The final section of the methods chapter will review the strengths and limitations of the methods employed.

Justification of Methods Used

In this section the methods used in the research will be justified. Firstly, epistemological issues are discussed, the reasons for choosing the methods that were used are outlined and consideration is given to methods that were not used. The next two sections consider the questionnaire in detail. Firstly, the design of the case vignettes is described to explain how they were thought to be suitable for answering the research question. Secondly, the questions asked in relation to each of the case vignettes are considered in terms of their validity in answering the research question. Following this, more general issues are discussed: the feasibility of the research, its appropriateness and whether conclusions drawn can be thought of as robust and transferable.

Epistemology

The main epistemological positions will be outlined and then related to how the research question was addressed. Epistemology is defined as the relationship between

the researcher and the subject (Terre Blanche and Durrheim, 1999) or a theory of knowledge (Mason, 1996:13):

Your epistemology is literally, your theory of knowledge, and should therefore concern the principles and rules by which you decide whether and how social phenomena can be known, and how knowledge can be demonstrated.

Within sociological research the debate regarding the use of research methodologies has been anchored within two apparently opposed epistemological positions (Henwood and Pidgeon, 1993; Durrheim, 1999). These positions are the experimental or positivist approach and the naturalistic or interpretative approach and can be briefly summarised for the purpose of this research.

Positivism is a collection of rules and evaluative criteria referring to human knowledge (Kalakowski, 1993). The main rules are firstly, the rule of phenomenalism that suggests there is no real difference between essence and phenomenon. The second is the rule of nominalism that insights formulated in general terms cannot have any referents other than individual concrete objects. Thirdly there is a rule that refuses to call value judgments and normative statements knowledge. Fourthly, positivists have a belief in the essential unity of the scientific method (Kalakowski, 1993). Positivists have tended to approach research settings with the intention of controlling them, and have relied on experiments and surveys to elicit information (Durrheim, 1999).

The alternative position is expressed in the naturalistic or interpretative paradigm (Henwood and Pidgeon, 1993). This consists of an emphasis on description rather than explanation; a representation of reality through the eyes of the participants; a commitment to the importance of viewing meaning and behaviour in context and in its full complexity; a view of scientific processes as generating working hypotheses rather than immutable empirical facts and an attitude towards theorizing that emphasises emergence of concepts from data rather than the imposition of a priori theory. The tradition in the interpretative paradigm is to move from data towards theory (Henwood and Pidgeon, 1993). Interpretative researchers investigate how categories of observation emerge in context (Durrheim, 1999).

Quantitative research is associated with the positivist paradigm and qualitative research is associated with the interpretative paradigm (Durrheim, 1999). It is possible, however, to overstate the differences between the two epistemological positions as many researchers use both qualitative and quantitative methods (Bryman, 1986; Henwood and Pidgeon, 1993). Qualitative researchers can be assisted by the collection of quantitative data (Bottoms, 2000; Mhlanga, 2000).

The research for this thesis sought both quantitative and qualitative data, for reasons related to the epistemology. The use of mixed methods is characterised as ‘pragmatism’ (Tashakkori and Teddlie, 1998:5) and suggests that the qualitative and quantitative paradigms are compatible, and can operate most effectively in partnership (Tashakkori and Teddlie, 1998).

In this research, the processes of decision-making were to be researched: what factors practitioners considered, what weight they gave to them, what they thought might be the outcome of their decisions and how they might relate to other professionals. This aspect of the investigation fitted within an interpretative position and could best be researched through qualitative methods. Outcomes were also of interest. The preliminary inquiry is faced with a clear list of options and has to make a decision about the immediate future of a young person. The finite number of options that are possible make this aspect of the process well suited to quantitative research.

The possibility of using an exclusively positivist, quantitative methodology, was rejected as it would not have provided the information required about thought processes and the reasons for making decisions. It would also not have reflected the uncertainty of the position that child justice practitioners found themselves in, as they were waiting for new legislation to be enacted. An exclusively qualitative, interpretative approach would have led to difficulties in making comparisons, but, would also have been an inaccurate reflection of the work that child justice practitioners carry out. It is not possible for them to discuss all the issues yet not make a decision in court and it was

hoped that the research method would reflect in some way, that decisions about child offenders would have to be made.

Choice of Research Instrument

This research investigates the way in which the Child Justice Bill's proposals appear likely to affect the process of diversion from prosecution for children. As discussed in the previous section, the aim was to gather both quantitative and qualitative data. There were a number of methods possible for investigating this issue and, before outlining those that were chosen and used, other possible methods that were considered and rejected will be described.

The primary method that was considered and rejected was one of observation. That would have involved attending a preliminary inquiry, or a number of preliminary inquiries and taking note of what happened as part of the process. This could have led to the development of a descriptive account of the process (Kelly, 1999a). Actual practitioners could have been interviewed, as well as offenders, victims and their families. There are a number of variations that could have been made on this method. The Preliminary Inquiry could have been observed openly as a researcher; the Bill provides special dispensation for researchers to attend preliminary inquiries with the permission of the magistrate in Chapter 5, s27 (5) (c). Alternatively the researcher could have arranged to be a participant observer, participating fully in the process being studied with or without other participants knowing the reason for the researcher being there (Sarantakos, 1998; Bhana, 1999; Jupp, 2000). Work as a child justice probation officer could have been obtained, thus gaining access to the Preliminary Inquiry. Had the Preliminary Inquiry been instituted, covertly researching the Inquiry while working as a probation officer would have been considered. However, both practical and ethical issues would have been raised. It may have been possible to overcome the difficult practical issues, such as the need to obtain a new work permit, but it would not have been ethical to carry out the research in a covert manner. Whether covert research is ever ethical is a subject of debate (May, 2001; Herrera, 1999), but it would not have

been justified in this research as there were no issues of personal safety involved, and no information could have been obtained by acting covertly that could not have been obtained by acting openly (BSC, 2003).

However, open direct observation was an attractive proposition and being able to observe the working of a preliminary inquiry would have added value to the research. Such research potentially provides great dividends, despite the difficulties and limitations of such an approach (Sarantakos, 1998; Bhana, 1999; Baldwin, 2000). For example, observation could have established whether processes outlined in the Bill, such as assessment by a probation officer, were followed in practice. Direct observation was primarily rejected as a method for this research for the obvious reason that the Bill had not been enacted, and there was no preliminary inquiry to observe. Had that not been the case then permission would have been sought to observe the preliminary inquiry process, attending as a researcher. This, however, would have supplemented other research methods rather than providing the primary research method. Court observations can only demonstrate the 'public face of justice' (Baldwin, 2000:245) and it would still have been necessary to interview participants and to use questionnaires and case vignettes as the primary research method, for the reasons outlined below.

Another method that was considered was the case study approach (Lindegger, 1999). This would have entailed following a small number of cases through the court process and asking the professionals involved what decisions they would have made had there been a preliminary inquiry. The attraction of this approach would have been that rich data could have been gathered about real cases. However, there were potential problems with following such an approach. As previously stated, the researcher was employed in a full-time post while carrying out the Eastern Cape aspect of the research and it would have proved impossible to guarantee availability to attend significant events, such as court appearances, at short notice. In the Western Cape, there would have been a risk of cases being delayed or adjourned until after the end of the short period when the researcher was in the province, which would have led to incomplete data. Case study research in general is limited in that there can be problems in drawing generalisations from a small number of cases (Lindegger, 1999), and this would be

particularly true in this instance for the reasons already stated, as well as the need to hypothesise about behaviour after the enactment of the proposed legislation.

Consideration was given to waiting until after the Bill was enacted before administering the questionnaire. It was tempting in September 2001 to wait the few months that it was suggested that it would take until the Bill became law and then carry out research into the implementation of an innovative, new child justice regime. The continuing uncertainty about the enactment of the Bill, combined with time restrictions, made a persuasive case to go ahead with the fieldwork and investigate the period prior to the enactment of the Bill. As the Bill remains to be enacted in February 2005 the passage of time has proved that this was the correct decision, given the resource constraints on a PhD student, working alone.

It was decided to use a semi-structured questionnaire to carry out this research. A questionnaire is defined as a selection of written questions used to gather information from respondents (Kanjee, 1999). This decision was made on the basis that such an approach would allow a large amount of both quantitative and qualitative rich data, relevant to the research question, to be gathered in a short period of time. Using a semi-structured questionnaire would facilitate both the gathering of data by post and the use of interviews.

A semi-structured questionnaire was drawn up based on a combination of qualitative and quantitative methodologies. Utilising both methods allowed the problems of one strategy to be compensated for by the strengths of the other strategy, and allowed different sorts of data to be collected (Francis, 2000). The questionnaire was designed so that it could be used both as a postal questionnaire, and as an interview schedule for individual or group interviews. The questionnaire administered was predominantly based on the use of case vignettes with open-ended questions, supported by closed, multiple-choice questions designed to generate quantitative data. The vignette technique involves interviewers asking interviewees to consider hypothetical situations and provide responses to them (Kemshall, 1998a). This technique was chosen because it is a good way of surveying values, beliefs and attitudes (Kemshall, 1998a). The

questionnaire included multiple-choice questions regarding the decisions to be made about the vignettes that were designed to generate quantitative data. It was administered to probation officers, prosecutors and magistrates through both interviews and postal questionnaires.

Once the decision was made to use questionnaire-based research it would still have been possible to design and administer those questionnaires in many different ways (Kanjee, 1999). In brief, the methods that were considered but not used primarily consisted of the possibility of solely using a method that was eventually used in combination with other methods. An entirely quantitative study, with a questionnaire consisting solely of closed questions, would have led to much less rich data being gathered (Denzin and Lincoln, 2003). An entirely qualitative study, with solely open questions in the questionnaire, would have reduced the focus of the research and made it much more difficult to draw general conclusions (Francis, 2000). If interviewing respondents had solely been relied upon then data would have been gathered from fewer respondents over a smaller geographical area (Van Vuuren and Maree, 1999), and if no interviews at all had been done then it would not have been possible to gain the rich and detailed data that the interviews provided (Van Vuuren and Maree, 1999), nor would the process have provided the experience of visiting the offices and courthouses that provided insight into the child justice context of South Africa.

Methods of sample selection were also considered that would have increased or reduced the geographical scale of the study. However, a study that was solely situated in the Eastern Cape may not have produced enough data, nor would it have provided the diversity of experience that is contained in the two provinces. A study encompassing the whole of South Africa would have presented logistical and financial difficulties that could not have been overcome within the resources available.

Using a semi-structured questionnaire consisting of case vignettes and a selection of closed and open questions enabled data to be gathered that would answer the research question of how the Bill's proposals appear likely to affect the process of diversion from prosecution for children. Quantitative data would be gathered that would allow

comparisons to be made between the diversion decisions made regarding different children, by different groups of professionals and across different geographical areas. Qualitative data would be gathered that would provide insight into the reasons behind the decisions that were made, and whether the new proposals in the Bill were likely to affect those decisions. The use of case vignettes would encourage respondents to think widely about the issues raised, and to answer in a way that replicated as closely as possible the way that they would respond in practice.

Suitability: Devising the Questionnaire

It is necessary that the research instrument used is suitable for addressing the research question that is to be investigated (Denscombe, 1998). The questionnaire was suitable for addressing the above issue because it asked each respondent questions about his or her general attitude to the Bill and then asked them about the recommendation that they, as criminal justice professionals, would make for each of the four case vignettes which each set out a decision making scenario in the form of an individual case. These responses could be explored and compared across regions and professions to see how discretion is likely to be exercised.

The questionnaire was supported by a cover letter that explained the purpose of the research and guaranteed confidentiality. Both the questionnaire and the letter appear in Appendix A.

Both the questionnaire and the cover letter were written in English. South Africa has eleven official languages and the Constitution gives everyone the right to use the language of their choice (Burger, 2003). However, the main language of government, particularly for internal communication is English (Burger, 2003). The participants in this questionnaire would all be graduates and so would be required to be proficient in either English or Afrikaans. In the Eastern Cape and in Cape Town the language spoken in official contexts would be most likely to be English (Burger, 2003) and, for this reason, English was chosen as the language for the questionnaire. However, as will

be described later in this chapter, a decision was made at a relatively late stage of the fieldwork to administer the questionnaires to professionals in the rural Western Cape. In that region Afrikaans would have been more likely to have been spoken in official communications (Burger, 2003). Questionnaires in English were sent to that area but the response rate was lower than in other areas (see Table 2). It is possible that the choice of language was a factor in this and, in retrospect, offering to send an Afrikaans version of the questionnaire to professionals in the Western Cape might have been more appropriate.

The main part of the questionnaire asked for responses to case vignettes but, prior to that, the respondents were asked to give some personal details and then to answer general questions about the Bill. The personal details included such issues as job title, agency and geographical region but also included race and gender. This was partly due to the questions in the case vignettes that related to those issues but also because South Africa remains, to some extent, a divided society and it was thought that there may be racial and gender differences in the responses to the case vignettes. Terminology remains a controversial issue in South Africa and the categories of race in the questionnaire were taken from the South African 2001 census (Statistics South Africa, 2004).

The questions in parts two and three of the questionnaire are a combination of open and closed questions. The open questions allow the respondent to communicate his or her views about the subject without any restriction (Kanjee, 1999). The closed questions forced the respondent to select a choice from a list provided, eliciting a standardised set of responses and allowing easier comparative data analysis (Kanjee, 1999).

Part two of the questionnaire asked general questions about the Bill; it investigated how prepared respondents were for its introduction and how committed they were to its principles. It was anticipated that this might reveal differences in values as well as differences in training between professions or regions. A part two question was also designed to discover the existence of diversion options in different areas. This data would indicate whether diversion from prosecution could be affected by the preparation

that professionals had received for the Bill, or by the different services available in each area.

The four case vignettes in part three were designed to elicit particular issues in the discussions of the respondents. The vignettes are designed to be in some sense representative of the sort of cases that might come to a preliminary inquiry but also to contain enough ambiguity to allow discretion to be exercised. The issues can best be explored by considering each case vignette in turn. The actual case vignettes as presented to the participants are contained in the questionnaire at Appendix A.

Sipho

Sipho's personal details were designed to be typical of many young offenders, and to exhibit the factors that are associated with juvenile offending: poor school record; inconsistent and abusive parenting; periods of homelessness; illiteracy and living in a community with a high crime rate. However, some recent positives about his situation were also included, such as his desire to return to school and his re-established relationship with his mother. The intention was to create an impression that Sipho might be a young person who could respond differently to a diversion opportunity on this occasion than he had done previously.

Sipho is a persistent offender, and the intention was to create the impression that he was someone who would have been excluded from the present diversion regime because of his record. There is, however, no violent crime in his record and no suggestion that his offending is increasing either in frequency or severity.

The intention was to make the previous disposals that had been tried with Sipho commensurate with his record but also to highlight the limitations of the current child justice regime. It would be quite usual for records to be lost and for a child to spend time on remand in adult prison (particularly if he had been homeless at the time). Again, some positive factors are included such as his cooperation with all the professionals who have tried to help him. That an offender would not pay restitution

after a victim-offender conference is a relatively common occurrence, particularly if the offender is young, poor and homeless as Sipho may have been. It was anticipated that practitioners who were experienced in restorative justice would realise this but that others would react differently.

This offence was a minor one that Sipho takes responsibility for committing but did not instigate. Those advocating for the Bill are very keen that such cases (classified as Schedule 1 offences) be diverted, even if the offender had a previous record. The case vignette was designed to establish whether practitioners shared this view, and would recommend diversion in the light of it.

Vusi

It was anticipated that the discussion regarding Vusi would centre on the offence that he committed, rather than on his personal circumstances, so they were presented very positively. It is not unusual that a young person who has committed a sexual offence will have no previous record and receive positive reports from both home and school.

Some of the factors of the incident were included to be typical aspects of this type of offence: that the offence was intra-familial and that the assailant had been drinking. It is also relatively common that there be a dispute over the exact facts, despite the offender admitting guilt; in cases where the offender and victim are both children what seems to be a dispute over facts may in reality simply be confusion about terminology. The remorse shown by Vusi, along with the positive personal factors serve to counter the serious nature of the offence and allow respondents who would like to consider Vusi for diversion to do so.

Peter

Peter is the only white offender of the four case vignettes and his vignette was designed to highlight issues of race and class. He is a privileged child, the sort of young person who would not normally be expected to come to the attention of the criminal justice

system. The information about his future ambitions was included to highlight the difference if he were prosecuted rather than diverted; a diversion would mean that he would not receive a criminal record so his employment and travel plans would not be jeopardised.

The offence is a serious one, and a slightly unusual version of the quite typical offence of car theft. There was ambiguity in Peter's reaction to the offence; he admits guilt but conceals details that might further implicate him or others. The professional arguments surrounding the diversion decision would be likely to focus on how to respond to such a serious offence while meeting the needs of the child.

Zanele

Zanele is the only girl among the four case vignettes and the vignette was designed to highlight gender issues. Zanele is another young person from a troubled background, like Sipho, with a more typical offending background than Peter or Vusi. However, her behaviour has not brought her to the attention of the criminal justice system until recently and the words used to portray her ('rude', 'troublesome' and 'disruptive') could describe a wide range of anti-social actions, which would not necessarily constitute criminal behaviour.

There is ambiguity in all aspects of Zanele's case. The offence could be interpreted as a serious assault or just part of normal teenage behaviour; her lack of remorse could be seen as normal or problematic and her behaviour as a whole could be seen as typical teenage conduct or the start of an escalating criminal career. The decisions about diversion would be likely to incorporate some views about these issues as well as possible gender-based views about a girl's need for a welfare-based rather than a punishment-oriented disposal.

There were also issues that were designed to be raised by all the case vignettes such as risk assessment, restorative justice, rehabilitation and personal values. The questions following each case vignette asked the respondents about the diversion decision that

they would make and why they would make it and also asked them to give an opinion of how their colleagues in other agencies might respond to each case, to give a sense of how they believed the preliminary inquiry system might operate in practice.

Validity

Validity relates to whether the methods used are appropriate to measure what was intended to be measured, and whether the concepts involved can be measured in that way. A valid account is one that is well-grounded conceptually and empirically and can be defended as sound and credible (Dey, 1993; Durrheim and Wassenaar, 1999; Jupp, 2000). As with reliability, the concept of validity has been critiqued and doubt has been expressed as to whether it is appropriate to apply it to qualitative data (Durrheim and Wassenaar, 1999; Hollway and Jefferson, 2000). Hollway and Jefferson (2000) suggest that it is more important that the stories told by researchers be methodologically, rhetorically and clinically convincing. Sarantakos (1998) suggests that rather than assessing validity, researchers should demonstrate methodological excellence, doing research in a professional, accurate and systematic manner. He suggests four forms of validation that research can be judged against, and these will be considered in turn.

Cumulative Validation

A study can be validated if its findings can be supported by other studies; the researcher can compare findings and make a judgment about validity (Sarantakos, 1990). There have not been similar studies carried out into the use of discretion in the preliminary inquiry but the research was designed in a way that would allow future researchers to repeat the process, using the same questionnaire or other methodology. The use of a structured questionnaire based on case vignettes allows the research to be repeated, either in different locations, at different times or after the Bill is enacted.

Communicative Validation

This allows research to be validated through re-entering the field and asking additional questions of the research subjects (Sarantakos, 1990). Due to logistical reasons it was not possible to do this by returning to South Africa after the completion of the fieldwork. However, the findings will be disseminated in South Africa, allowing both the research subjects and academic observers to assess the findings against their own experience.

Argumentative Validation

Findings can be validated argumentatively by presenting them in such a way that the conclusions can be followed and tested (Sarantakos, 1990; Durrheim and Wassenaar, 1999). In this thesis the data has been presented and analysed in a detailed and systematic way so conclusions can be tested against the data. The communication of knowledge is dependent on the form in which it is presented (Flick, 2002) and it is contended that this data is presented clearly and unambiguously in chapter three of this thesis, through tables, quotations and discussion.

The presentation of the data follows the structure of the questionnaire and this structure can best be demonstrated by considering the questions asked following each case vignette (see Appendix A).

The respondents are first asked to indicate whether they would be likely to recommend the young person for diversion. The question is a scaled question (Kanjee, 1999): the respondent is given a number of options, and then asked to explain his or her answer. This approach is followed in all of the questions, where it is appropriate, and gives rise to both quantitative and qualitative data; the reasons for seeking both types of data have been previously discussed. The second question asks for further elaboration of this decision, asking the respondent to identify the main factor in their decision. These two questions together are designed to generate data illuminating the decision to divert and the reasons behind it.

The third and fourth questions relate to diversion options and are designed to discover which options are available, and known about by practitioners, and which options are preferred.

Questions five and six generate data about the confidence that practitioners have in the disposals available to them. By encouraging respondents to expand on their answers it was hoped to gain insight into the availability, use and perceived effectiveness of both diversion options and custodial sentences.

The latter part of the questionnaire was designed to investigate the attitudes of the practitioners towards other criminal justice professionals. They were asked both about their view of other professionals' attitude to diversion and whether that attitude would affect the decision that they made themselves.

Finally, the respondents were invited to add any other comments about the case vignette. As it was an objective to investigate the attitudes behind the decisions made, it was appropriate to include an entirely open question, and many respondents took the opportunity to make additional comments. This also allowed respondents to refer to issues that had not been initially considered by the researcher.

The data is presented in a way that follows this clear structure and is then analysed according to themes. The structured nature of the questionnaire and the link between this and the presentation and analysis of the data allow the reader to both follow and test the main arguments, so meeting the criteria for argumentative validity.

Ecological Validation

According to Sarantakos (1990) a study is valid if carried out in the natural environment of the subjects, using suitable methods and taking into account the life and conditions of the researched. This form of validation seems to apply more to respondents being interviewed on a personal basis than on a professional basis but the respondents in this

research were seen in their places of work such as offices and courthouses. As well as ensuring validity in their responses this added richness to the research, allowing a sense to be gained of the working environment. Numerous court houses and social work offices were visited to carry out interviews and tours of these buildings were occasionally provided by staff members. Two South African prisons, and two places of safety, were visited to see the conditions in which incarcerated children were housed. Training events and conferences were attended, sometimes as an observer and sometimes as a participant to gain a flavour of the services being offered by NGOs and the state. On one occasion Parliament was visited to observe the deliberations of the Department of Justice Portfolio Committee; this was an enlightening experience that brought the committee to life in a way that cannot be done by merely reading minutes. Visiting social work offices entailed entering the poorest areas of South African townships and passing up to two hundred people waiting outside the building seeking welfare assistance. This added credibility to the responses of probation officers when they expressed scepticism about the Bill being adequately funded or the adequacy of their own training. In addition, it confirmed that the case vignettes that were devised were based on cases that were likely to be encountered by the professionals responding to the questionnaires.

Carrying out visits provided additional knowledge and insight that would have been difficult to obtain in any other way. Visiting people in a particular context adds credibility to what they say about that context. For example, the researcher had the experience of hearing a manager talking about the effectiveness of diversion services his project offered, after visiting a nearby adult prison a few hours previously. There were dozens of children incarcerated in the prison. The two visits highlighted the possibility of a diversion regime being introduced that was a success on its own terms but still did not cater for the needs of large numbers of children. Even the process of driving through townships to get to courthouses or social work offices provided insight into the context of the work that was being done, and the great social needs that are present in many areas of South Africa.

There are occasions when qualitative or mixed methods can achieve higher validity than solely quantitative research (Sarantakos, 1990; Tashakkori and Teddlie, 1998). This seems to be clearly the case in this research; the use of case vignettes and open questions allowed richer data to be gained than if solely quantitative methods had been used. To the data elicited from questions surrounding the number of people who would divert a particular child can be added the data elicited from questions surrounding the reasons for those decisions. It was possible to consider the opinions and views of the practitioners, to be flexible and to build communicative relationships with the research subjects, particularly those who were interviewed.

Feasibility

Resources, available time and geography restricted the methods chosen.

The initial part of the research was carried out as a self-funded PhD student while employed at the University of Fort Hare. Although the University was supportive of the research it was not able to make significant resources available, because its financial situation meant that it lacked the ability to support staff in carrying out research, particularly staff members who were employed on fixed term contracts. This job involved commitments to teaching, supervising students and developing course materials. The impact of this on the author's research in the Eastern Cape was that it was not possible to take as much time as desired to do face-to-face interviews with subjects, so the research in this area was quite reliant on the use of postal questionnaires. In addition, the vast geography of the Eastern Cape meant that it was only possible to carry out interviews or hand deliver questionnaires in some areas: Port Elizabeth, East London and their environs. Areas such as Graaf-Reinet, in the West of the province and Umtata, in the North of the province, were too distant to visit in the time available.

Three months were spent in Cape Town, working full-time on the research, so it was possible to carry out many more face-to-face interviews in that city. However, the vast distances of the Western Cape and the researcher's lack of resources meant that postal questionnaires were relied upon in carrying out research in the wider Western Cape.

The anticipation of the variety of styles of gathering information that would be used was an influence in the choice of research methods. The questionnaire was designed as an instrument that would be suited to postal questionnaires, individual interviews and group interviews. The response rate was poorer when postal questionnaires were used, but those that were returned provided good quality data.

Appropriateness

The use of semi-structured questionnaires using case vignettes was considered appropriate for collecting the required data. As stated above, it was a method that could be used for individual interviews, group interviews and postal questionnaires. Respondents who received the questionnaire by post could complete it on their own by following the simple instructions and the combination of multiple choice questions and more open questions meant that busy practitioners could complete it quite quickly and still provide useful information. The questionnaire could also be used as an interview schedule for individual or group interviews. There was enough structure to enable results to be produced that could be generally compared, combined with enough flexibility to allow follow-up questions to be asked and issues raised by the respondents to be explored in depth.

Part of the motivation for including both open and closed questions in the questionnaire was to aid the respondents and to allow both those who wanted to discuss the issues in detail, and those who were only able to make brief responses, to contribute to the research (Kanjee, 1999). Using both methods also allowed quantitative data to be gathered that could be easily compared across regions and professions to provide a general picture and allowed rich, qualitative data to be gathered, to enable the more detailed underlying values and discourses to be explored (Kanjee, 1999).

Administering the Questionnaire

Pilot Study

Pilot studies are used to identify potential problems with research, and involve the administration of research instruments being used with a small sample of respondents prior to the main research (Kanjee, 1999).

As part of the determination of the appropriateness of the questionnaire it was piloted in two stages before being sent out. Firstly it was sent to a diversion project manager with the request to complete the questionnaire and comment on the process. She was chosen as a pilot because not only had she been involved in the campaign for the implementation of the Bill and designed a diversion programme but she had previously worked as a criminal justice social worker, so she could provide a practitioner insight into the questionnaire. She commented favourably on the questionnaire, with her only criticism being that it took a long time to complete. This was reflected upon but it was decided that most respondents would not complete the questionnaire in as much detail as she did and it would not be possible to shorten it without diminishing the study. However, cosmetic changes were made, allowing the questionnaire to be a slightly less bulky document. As no changes of substance were made this pilot questionnaire was included in the final study, where it appears as questionnaire #63.

The second part of the pilot involved handing questionnaires to probation officers at a conference and asking them to return them in the stamped addressed envelopes that were provided. Those that were returned were assessed but no issues arose that suggested changing the questionnaire so it was used in that form with subsequent respondents. These completed questionnaires also feature in the final study.

The only problem with the questionnaire that subsequently arose was a possible misunderstanding of the terms 'pessimistic' and 'optimistic' by a very small number of

participants. This did not show up in the pilot study and is discussed in more detail later in this chapter.

Thus, it would appear that the use of a semi-structured questionnaire, the structuring of questions within it and the categories of data elicited, were appropriate for answering this research question.

Choice of Methods

The questionnaire was administered in three ways: as a questionnaire completed by the respondent on his or her own, and as an interview schedule with respondents either individually or in a group.

As Table 1 illustrates, only 10% of the subjects were interviewed and the rest were asked to complete the questionnaires on their own and return them. Questionnaires for self-completion were chosen as the primary method of collecting data because they have the advantages of allowing information to be collected from a wide geographical area, and they allow respondents to maintain their anonymity (Van Vuuren and Maree, 1999). In the knowledge of the generally low return rate for postal questionnaires (Van Vuuren and Maree, 1999) steps were taken to try and encourage respondents to complete and return the questionnaires. Where possible the questionnaires were either delivered or collected by hand, which allowed a relationship to be established with the respondents, ensuring that the questionnaire had reached the correct person and eliminating some possible administrative hurdles towards returning the questionnaire. It was also possible to discuss briefly the questionnaire and the Bill with some respondents. Where it was not possible to visit offices the practice was to phone in advance of sending the questionnaires and to phone again a few weeks later to remind the subjects. All postal questionnaires were sent with a cover letter and a stamped addressed envelope. These supportive measures were least able to be carried out in the rural Western Cape due to constraints of time, money and geography and that perhaps helps to explain the poor response rate from that area.

The personal interviews that were carried out in addition to the questionnaires allowed detailed information to be gained from respondents, and allowed respondents to clarify points that they did not understand (Van Vuuren and Maree, 1999). The practice followed in the Eastern Cape was to offer the option of an interview to professionals who were geographically accessible (i.e. within three hours drive) and two groups of professionals accepted that offer. The same offer was made to professionals in Cape Town and twenty-two professionals agreed to be interviewed. As previously outlined, the offer to carry out an interview was not made to professionals in the Western Cape.

The questionnaire was used as an interview schedule for these interviews, which meant that the interaction took the form of a semi-structured interview. Respondents were able to talk in detail about the vignettes, and about the practices in their area, while still adhering to the basic structure of the schedule.

Some professionals were interviewed individually, and some in groups. Group interviews were carried out primarily for logistical reasons; on occasion professionals requested to be interviewed as a group and offered to arrange such sessions. However, group interviews also allowed the interaction between professionals to be observed, and enabled discussions to take place between those with different levels of experience, or those who covered different regions.

In total, 6 group interviews were carried out, and the size of the group ranged from 2 to 4 members. The group interviews were not designed to be focus groups, in that they did not meet the characteristic of a focus group in primarily encouraging group members to talk to one another (May, 2001). The process was one of putting the questions to each group member in turn and then encouraging dialogue with the researcher. In facilitating a group interview it is important to be aware of the dynamics within the group and to avoid particular individuals becoming marginalised (Kelly, 1999a). This was done by providing each group member with a questionnaire and ensuring that each individual had the opportunity to individually answer the multiple-choice questions, even if the conversation about the details became dominated by another group member. This also aided the recording of the interviews, as the respondents could record their answers, as

well as the interviewer noting them. The use of vignettes meant that the discussion was an engaging one, and participants maintained interest throughout the interview. On one occasion the group interviewed contained a magistrate, prosecutor and probation officer. Particular care was taken on that occasion to be aware of possible power dynamics, and to ensure that all participants had an opportunity to respond.

It was decided to record both the group and individual interviews by taking notes, rather than by the use of a tape recorder. All interviews were carried out in the participants' offices; this meant that the researcher had no knowledge of the environment, nor any control over it. Tape recorded interviews, particularly group interviews, can be difficult to comprehend if recorded in a busy office (Kelly, 1999a), and there would have been a risk of losing valuable data had the interview not been adequately recorded. This would have been particularly serious for this research as the combination of the busy schedule of the participants and the limited time that the researcher would remain in the country meant that it would have been unlikely to be possible to reschedule any interview that was not adequately recorded. In all interviews hand written notes were made by the researcher. The participants were provided with copies of the questionnaire, primarily to allow them to read the case studies, and participants sometimes indicated their answers by writing on the questionnaires, as well as expressing them verbally. All questionnaires were collected by the researcher after the interview and all notes, both those made by the researcher and any made by the participants, were typed by the researcher immediately following the interview.

It is indicated in Appendix B which method was used to gain information from each respondent. Responses in the data presentation and analysis are attributed to the respondent who gave them, so it is possible for a reader to establish how the information was gathered, by referring to this Appendix.

Reliability and Robustness

Reliability is related to consistency so that results should be able to be repeated and others using the same procedures should be able to get the same results (Dey, 1993;

Durrheim and Wassenaar, 1999). Reliability is a measure of the wider potential of research and is achieved according to certain methodological conventions (Mason, 1996).

The main method of collecting the data was by postal questionnaire; 43 of the 68 total respondents (63%) completed the questionnaire themselves. Most did so by hand but one respondent typed on the questionnaire and two respondents (both part of the group of reformers) requested electronic versions and returned them by electronic mail.

Those interviewed were questioned using the structure of the questionnaire. As discussed above, note-taking was the chosen method of recording. The respondents were given questionnaires and encouraged to read the case vignettes for themselves and to write their answers on the questionnaires as they discussed their responses either individually or with other practitioners when they were being interviewed as part of a group. Detailed notes were taken by the researcher during the interviews.

In group interviews, it was most common for the participants to quickly reach a consensus about each question: one person would respond and the others would nod, state their agreement or make a supportive comment. This was confirmed by asking if they were all in agreement and making a point of individually checking the answer to the quantitative, scaled part of the question. All group participants had the opportunity to answer the scaled questions but on occasion only some of the participants would make more detailed comments. When recording, such comments were attributed to the participant who had made them.

All the questionnaires were typed up after they were received. This made the analysis easier administratively but also formed part of the process of immersion. By spending many days re-reading the data, organising it into sections and typing it out, it was possible to gain a much clearer impression both of individual questionnaires and of the data as a whole. On the rare occasions that the comments made were illegible this has been noted.

As previously noted, South Africa is a country with eleven official languages and many respondents will only speak English as an additional language. They will, however, have become used to using English in official documents as well as in the latter stages of their education. Many of the respondents made spelling or grammatical errors in completing the questionnaires. Obvious spelling mistakes have been corrected but grammar has not been corrected, as it was felt that the risk of changing meaning away from what was originally intended was too high.

One possible point of linguistic confusion is in questions 5 and 6 regarding optimism and pessimism. On a small number of occasions respondents circled one answer but made comments that suggested that they meant the opposite. Unfortunately, this problem did not show up in the pilot of the questionnaire. Again, it was felt that it would be inappropriate to correct this but note has been made of it in the analysis of the data when conclusions have been drawn. Caution has been exercised in drawing too strong general interpretations regarding this question, particularly where a respondent has circled a word and not expanded on his or her answer.

As previously stated, questionnaires were sent to the rural Western Cape to supplement the fieldwork done in the Eastern Cape and in Cape Town. There are areas of the rural Western Cape where Afrikaans is primarily spoken, even in court proceedings. It is possible that many practitioners who received questionnaires in this region would have rarely spoken English (although it would be unlikely that a legal professional or probation officer could not speak the language at all) and this may have been a contributing factor to the low rate of return from that region.

For these reasons it is necessary to be cautious about stating that the results are representative of all criminal justice professionals in the Eastern and Western Cape. However, this is at least partly a consequence of the nature of the research and the nature of the uncertain child justice regime within which the research was carried out.

Reliability is often difficult to ensure in qualitative research (Durrheim and Wassenaar, 1999). Hollway and Jefferson (2000) argue that reliability is an invalid criterion, that

meanings are unique as well as shared. They suggest that, contrary to the view of positivist science, the situations analysed in qualitative research are not replicable and that meanings are not just unique to a person but are also unique to a relational encounter. This argument is relevant to this research in that the decisions made by criminal justice professionals are hugely significant to the objects of those decisions, regardless of whether the views of the decision makers are representative.

Hollway and Jefferson (2000) argue that conclusions drawn should be defended by reference to the data generated and the notion of evidence. Work should be theoretically led as well as being solidly empirical, in the sense that supporting and challenging evidence is there. They suggest that robustness is a more appropriate criterion than reliability and that if there is evidence of what is interpreted then the research is robust (Hollway and Jefferson, 2000: 80):

Reliability can be checked (though never guaranteed) if, when our interpretations and analyses are studied by others, they are 'recognised'; that is, the sense that we made out of them can be shared through the subjectivity of others.

The combination of qualitative data and quantitative data gathered does assist in allowing others to study this data. The detailed presentation of that data, which includes many direct quotations, allows a reader to ascertain that the conclusions drawn are recognisable and the research is robust. Completed questionnaires, and transcripts of individual and group interviews are also available, if required.

Representativeness, Generalisability and Transferability

When producing an account it is necessary to consider carefully who it is representative of and to whom the account refers (Dey, 1993; Durrheim, 1999). Using the sampling strategy outlined in the following section was designed to ensure that information gathered would be in some way representative of the sample. However, some caution should be expressed in drawing that conclusion. The fact that the research was carried out in a transitional stage of South African child justice meant that it was not clear what

the 'whole population' was, as prosecutors and magistrates to work solely with children had not been identified. It is possible, therefore, that those who returned the questionnaires were those most interested in working with children; others may not have been interested in this work but may eventually have to become involved in it.

The concept of generalisability refers to the desirability that research findings should be able to be applied to a whole range of contexts (Durrheim, 1999). Sarantakos (1998) suggests that the concept of transferability might be more appropriate than generalisability for qualitative research. He suggests that the researcher should use triangulation, explain his or her methods and say how research was conducted, leaving it up to the reader to decide if the findings can be generalised or not (Sarantakos, 1998). The use of triangulation is outlined in a later section of this chapter, and the chapter as a whole explains the research methods, including sampling procedures, in detail. For the reasons that are given throughout this chapter the general conclusions that are drawn from this research can be stated with confidence.

Originality and Contribution to Knowledge

Murray (2002) provides a number of definitions of originality and this thesis conforms to a selection of them. As discussed below, South African criminologists have been constrained in writing about the Child Justice Bill by their desire to see it enacted, so the ability to adopt a more critical distance from the campaign for enactment gives this research some originality. Much of the writing on the Bill has been done by legal professionals and academics so aspects of the application of criminological and sociological theory in this thesis are also original. The conclusions drawn suggest the applications of approaches that have not been evident in South Africa to that child justice regime. One of the purposes of performing a literature review is to place the research in context and ensure that it makes a new contribution to the subject (Kaniki, 1999), and the review of literature for this research demonstrated that this was the case by reviewing theory and other research that had been done on South African child justice.

The research is also methodologically original. Case vignette based research has been done in interviews with probation officers in other jurisdictions (Kemshall, 1998a) and research has been done into diversion decisions in South Africa (Muntingh, 1998) but this is the first piece of research to interview three groups of professionals in South Africa about diversion decisions, using case vignettes, with regard to the forthcoming Child Justice Bill. It is also the first time that such views have been compared with the views of a group of child justice reformers.

This research does make a contribution to the understanding and development of child justice in South Africa. The Bill has now reached a stage where it is close to enactment and concern is being expressed about its implementation and the role and readiness of the professionals (PMG 2004a, 2004b, 2004e, 2004g). This research provides insight into the likely implementation of the Bill, and provides suggestions to strengthen the new child justice regime.

Research Subjects

This section will consider the research subjects: when the research was done, where it was carried out, how prospective subjects were selected and contacted and who the eventual subjects of the research were.

Timing and Duration of Fieldwork

The fieldwork for the research took place between August 2002 and June 2003. The pilot study was carried out in August and September 2002, as described above.

It was originally hoped to carry out the research after the implementation of the Bill which at the time that the proposal was formulated (August 2002) was due to be enacted later that year. As there seemed to be delay in its enactment and uncertainty as to exactly when that would happen it was decided to proceed with the research in

anticipation of the Bill and risk the possible disruptive effect of the Bill being enacted part of the way through the fieldwork. There was no change in the status of the Bill during the fieldwork, although it continued to be scrutinised by the Department of Justice Portfolio Committee. The progression of the Bill and its current status is outlined in Chapter Three.

The data was analysed and the thesis was written throughout 2003 and 2004, raising the possibility that there may be changes made to the Bill between the time of the fieldwork and the final completion of the thesis. The Bill has been commented on by the Department of Justice Portfolio Committee which has made changes to its contents but none of these changes have been published and at the time of writing (February 2005) the Bill has still not been enacted.

It has now taken so long to enact the Bill since the Project Committee that started the process was appointed in 1996, that the transitional period during which it has been promoted but not yet enacted could be considered to be a period worth researching in its own right. Nine years is certainly longer than some criminal justice legislation lasts before it is replaced.

Location of Research

The research took place in the Eastern Cape, Cape Town and the greater Western Cape. The regional variations regarding the relative use of postal questionnaires and individual and group interviews are outlined above. There were a number of reasons for choosing these areas. Administering questionnaires throughout the whole of South Africa was initially considered but it would have been impossible to do so across such a vast country. The Eastern Cape was chosen first as it was easy to gain access, both geographically and in terms of possible research subjects, as there were already connections with practitioners in that area. The Eastern Cape does have large cities but it is mainly a poor rural area, and child justice initiatives can be slow to reach the province (the One Stop Centre in Port Elizabeth being a notable exception to this). The

Eastern Cape is situated in the south-east of South Africa. It is a province of natural diversity, with forests, mountains and an extensive coastline. Its capital is Bisho but the largest cities are Port Elizabeth and East London on the south coast and Umtata in the north. It has a population of 6.4 million. The main industry is manufacturing, based in Port Elizabeth and East London, but the unemployment rate stood at nearly 15% in 2001. Over 20% of the population older than 20 years old has never received any schooling (Burger, 2003).

To complement the work in the Eastern Cape, it was decided to carry out research in Cape Town, which is a large city, is relatively resource rich and is the site from which many child justice initiatives originate. This would provide a rounded picture of the implementation of the Bill and allow comparisons to be made between responses in different areas. Cape Town is the capital of the Western Cape Province, and the legislative capital of South Africa. It has a population of approximately three million people, and is the second largest economic city in the country. It is the site of two major universities, and is an international tourist attraction, with nearly one million visitors each year (Burger, 2003).

The decision to include the greater Western Cape was made relatively late in the process and the reasons are discussed below. The Western Cape is situated on the south-west tip of South Africa. More than 4.5 million people live in the Western Cape; the majority are Afrikaans-speaking, with the other main languages being Xhosa and English. The primary industries are agriculture and fishing. It also has a strong tourism industry, centred on Cape Town (Burger, 2003).

Geographical Comparison

It had originally been anticipated that comparison between the geographical areas would play a major part in the analysis of the data but this, while still present, is now a less significant aspect of the analysis. This is a consequence of the delay in the implementation of the Bill; had the research been carried out after the Bill had been implemented there would have been a constitutional duty on the government to provide

an equal service across the country. Prior to the Bill's implementation the government can respond to any variation in service, and to any consequent accusation of not complying with the constitution, by arguing that it will be remedied by the introduction of the Bill; it employed this argument in the case of *State v Zuba* (Sloth-Nielsen, 2003b) to justify the lack of residential provision for child offenders in the Eastern Cape. There are still some, albeit now more limited, valid points that can be made about geographical differences in service provision and these are discussed in the analysis section.

Selection of Research Subjects

The selection process for each profession will now be outlined.

Probation Officers

Research was first carried out in the Eastern Cape. The Director of Welfare in the Department of Social Development in the Eastern Cape was approached; he was spoken to in person and this request was supported in writing. He provided a list of all probation officers in the Eastern Cape. Questionnaires were distributed to all these probation officers, a total of 68 probation officers, as shown in Table 2.

The majority of probation officers in the Eastern Cape were contacted by post and then reminded by phone to return the questionnaire. There were two main exceptions to this process. The first was the One Stop Centre where the magistrate, prosecutor and probation officer were interviewed together, as a group. Had it been possible to administer this research after the implementation of the Bill it would have been hoped to carry out many more interviews in this way but at the time of the fieldwork the One Stop Centre was the only place where the necessary close working relationships between the three professions were in evidence.

The other main exception was in one social work office where it was possible to interview four probation officers together as a group. It was hoped to be able to do this with more Eastern Cape respondents but this was the only group that was both available to do this and willing to put aside the time to be interviewed.

In addition, some questionnaires were able to be delivered or collected by hand. This was done to increase the likelihood of the questionnaires being completed, and it was also possible to clarify some questions, if necessary.

In the Western Cape, the local social work office in Cape Town provided a list of all the region's social work offices. The local managers of each of those offices were contacted and they identified the workers within their teams who carried out criminal justice work and agreed that they could be contacted. No manager ever refused permission to interview a practitioner.

Due to a combination of factors, such as the compact nature of the city and the greater amount of time available, it was possible to carry out many more interviews in Cape Town to supplement the postal questionnaires. Probation officers were interviewed both individually and in groups.

All the questionnaires in the Western Cape were administered as postal questionnaires. It had not been the original intention to extend the research into the rural Western Cape but towards the end of the fieldwork process it was felt that the research would benefit from further information, particularly from magistrates and prosecutors, so questionnaires were sent out to practitioners in the Western Cape region. This area was chosen because research had already been carried out in its major city, Cape Town, so some information about services in the region had already been gathered.

There was occasionally some confusion regarding the terminology and the titles and the division of labour; not all social work offices use the term 'probation officer' and most, but not all, had specialist criminal justice workers. The Bill itself refers to the definition of probation officer in the Probation Services Act 1991 (Act 116 of 1991) which

includes all social workers who carry out work in the fields of crime prevention and treatment of offenders. The Bill also allows the work of probation officers to be carried out by assistant probation officers, who perform similar work but are not required to be qualified. The problem of identifying the correct person was dealt with by speaking to local managers, explaining who was sought and why, and asking them to identify the person in their office who would be making diversion decisions when the Bill was enacted.

Prosecutors

It was not possible to obtain a list of child justice prosecutors as, prior to the implementation of the Bill, no such position exists except in the few courts that have created such a position for administrative reasons. This also means that it is not possible to establish what percentage of the whole population was sampled, as discussed below. The website of the National Prosecuting Authority of South Africa [NPA] (NPA, 2004) provides contact details of Senior Managers in the organisation. They were contacted by email and by phone and the advice that was given in both the Eastern Cape and the Western Cape was to contact individual prosecutors in individual courts. In addition, the Head of the National Prosecuting Authority was written to. He advised that training on the Bill would be carried out as it became law, and suggested that he be contacted again at the enactment stage. Unfortunately, that reply was only received after the fieldwork was completed. The reasons for deciding to proceed with the fieldwork prior to the Bill's enactment were discussed earlier in this chapter.

It was possible, however, to obtain a list of courts in the Eastern Cape and questionnaires were sent to each of those courts. Where possible these questionnaires were sent to named prosecutors and the researcher supported the sending of postal questionnaires with phone calls, either in advance or as a follow-up or both. As shown in Table 2, questionnaires were distributed to a further 40 prosecutors in the Eastern Cape. The technique used was snowball sampling that requires the researcher to make initial contact with a member of the population, and to use their help to find other members of that population (Davies, 2000; Francis, 2000; May, 2001). All

professionals, including probation officers, who were contacted were asked to provide details of any other prosecutors that they knew of, who worked in child justice. Davies (2000: 88) describes snowball sampling as 'akin to a chain letter' and that accurately describes the process that was undertaken to contact prosecutors.

In the Western Cape prosecutors were matched with the probation officers from whom information was gathered, either by asking probation officers to identify them or by looking up the court address in the phone book. The prosecutors were then contacted by writing to the courts where they worked. The snowball sampling technique that was used in the Eastern Cape was utilised in the Western Cape and Cape Town too. As shown in Table 2, 23 questionnaires were distributed to prosecutors in Cape Town, and 20 questionnaires were distributed to prosecutors in the rural Western Cape.

Magistrates

Again, no definitive list of child justice magistrates was available. In both the Eastern and Western Cape a similar method was followed to that used with prosecutors in the Eastern Cape of matching courts with the probation officers and social work offices that had been contacted. In the Eastern Cape one magistrate who was known to take an interest in child justice was interviewed and he was asked for contact details of other magistrates. He provided contact details of the Chief Magistrate who, in turn, made a reference back to the first magistrate interviewed, as well as providing contact details for a Children's Court Magistrate. When it was explained that both those people had already been interviewed he suggested that they were the only specialist children's magistrates in the province and that individual magistrates who work with children part of the time should be contacted. This approach was followed in both the Eastern and the Western Cape.

These magistrates were contacted by a combination of postal questionnaires, phone calls and personal visits. The snowball sampling technique, described above, was also utilised in an attempt to contact magistrates with experience or an interest in child justice. Seven questionnaires were distributed to magistrates in the Eastern Cape, seven

to magistrates in Cape Town and seven to magistrates in the rural Western Cape (see Table 2). A number of magistrates in Cape Town were interviewed individually, including one Children's Court Magistrate. The decision to interview her was made after a number of respondents suggested converting some of the cases to the Children's Court system. It was decided that gaining information from a Children's Court Magistrate about this process would add value to the research.

The Research Population

It is not possible to state definitively what percentage of the whole population was sampled, as a list of the requisite whole population does not yet exist. With regard to probation officers, many of them already work with children full-time and some of those that would be making diversion decisions under the Bill can be easily identified. This is not the case with regard to prosecutors and magistrates; the model of their current working practices is much further removed from the model envisaged by the Bill. Had the research been carried out after the enactment of the Bill there would have been specialist courts with specialist probation officers, prosecutors and magistrates and these groups could have been easily identified and contacted. The differences in policy between different areas and the discrepancies in the experience and training of child justice professionals was a finding of this research and the difficulty in identifying 'specialists' was a reflection of the existing child justice regime.

Child Justice Reformers

As well as interviewing criminal justice practitioners it was also decided to interview a group of the child justice reformers who had been most involved in drafting the Bill and campaigning and preparing for its implementation. It was envisaged that this could help compensate for the uncertainty caused by the delay in enacting the Bill; it would not be possible to compare the responses of the practitioners against the Bill itself so the attitude of the practitioners could be compared to the vision of the Bill held by those who were most closely involved in writing and campaigning for it.

As discussed in the literature review, the campaign by civil society to implement the Bill has been led by the Child Justice Alliance. The reformers selected were chosen on the basis of their connection with the Alliance, or on the basis of their involvement in drafting the Bill. All reformers interviewed have published work in support of the Bill and they have, between them, experience of: drafting the Bill; devising programmes of intervention based upon its provisions; planning the NGO response to the need for greater diversion programmes; monitoring the parliamentary process and campaigning for the Bill's implementation; and engaging in the scrutiny and redrafting of the Bill. All have a high level of knowledge of the provisions of the Bill and the enactment process that it was undergoing. The most senior individual in the child justice field in each particular organisation was contacted in the first instance and, on all occasions, the first person contacted agreed to complete the questionnaire.

One striking element regarding the profile of the reformers interviewed (see Chapter 4, Table 34) is that they are all white. This was a consequence of the selection process that relied on choosing those who had published work supporting the Bill, and were in senior positions in their organisations. In early 2003, when this fieldwork was carried out, there were no black reformers who met these criteria. The campaign to implement the Bill can be located within the liberal tradition of law reform in South Africa (Van Zyl Smit, 1999; Van der Spuy *et al.*, 2004) and the prominence of white reformers is perhaps a reflection of that tradition. The group of reformers chosen for this research thus accurately reflects the profile of child justice reformers in South Africa.

The decision to administer the questionnaires to this group of reformers did bring considerable benefit to the research project. As will be seen later in the thesis, there was a high degree of consensus in their responses, and the combination of these responses, the published work on the Bill, the submissions to the Department of Justice Portfolio Committee and the early drafts of the Bill provide a vital insight into the regime that it was anticipated would be created.

Subjects of the Research

In total, information was gathered from 67 individuals: 62 practitioners and 5 reformers. A total of 226 questionnaires was distributed in one of four ways; either through interviewing the subjects; posting them questionnaires and asking them to return them; hand delivering questionnaires and asking them to return them or by posting questionnaires and collecting them by hand.

Table 1 shows how questionnaires were delivered to practitioners. Information was also gathered from five reformers, either in person or by electronic questionnaire but they are excluded from the tables below as the issues related to gathering information from them are discussed separately.

Table 1: Methods of distribution of questionnaires

Method of Distribution	Eastern Cape		Western Cape		Whole Population	
	No.	%	No.	%	No.	%
Posted out to be returned by post	67	58.3	70	66.0	137	62.0
Hand-delivered to be returned by post	37	32.2	9	8.5	46	20.8
Posted out to be personally collected	4	3.5	12	11.3	16	7.2
Personal Interview	7	6.1	15	14.1	22	10.0
Total	115	100	106	100	221	100

In addition to the 5 reformer respondents, questionnaires were returned by 62 practitioners, a response rate of 29%. Table 2 shows how these responses were represented geographically and Table 3 shows the relative response rate of the three professions. The reasons for the slightly different approaches in gathering information in the two regions of the Eastern and Western Cape are discussed above.

Table 2: Responses to the questionnaire, by region

Region	Profession	Number Distributed	Number Returned	Percentage response	Regional Percentage Response
Eastern Cape	Probation Officers	68	16	23.5	27.0
	Prosecutors	40	11	27.5	
	Magistrates	7	4	57.1	
Cape Town	Probation Officers	19	15	78.9	51.0
	Prosecutors	23	5	21.7	
	Magistrates	7	5	71.4	
Rural Western Cape	Probation Officers	30	1	3.3	10.5
	Prosecutors	20	4	20	
	Magistrates	7	1	14.3	
Total		221	62	28.1	

Table 3: Responses to the questionnaire, by profession

Profession	Number Distributed	Number Returned	Percentage Response Rate
Probation Officers	117	32	27.4
Prosecutors	83	20	24.1
Magistrates	21	10	47.6
Total	221	62	28.1

The higher response rate from Cape Town was likely to be reflective of the fact that more of the questionnaires were delivered by hand there, or administered in interview. In the Eastern Cape all methods of distribution were used and in the rural Western Cape postal distribution was the sole method used.

The disparity in the number of questionnaires distributed reflects both the relative numbers of each of the professions working in the field of child justice and the number of child justice specialists in each field. Probation Officers were the most likely to describe themselves as working solely with children (i.e. those under 18), and some prosecutors were solely employed in the Child Court. On more than one occasion a senior prosecutor stated that there was no child justice specialist in that area and asked that questionnaires be sent to all the prosecutors in the court. This meant that ten or more questionnaires might be sent, with a relatively low rate of return. Magistrates were less likely to be specialists in the area, but when it was possible to identify a magistrate who was interested in child justice issues that magistrate seemed to be quite well inclined to participate in the research.

Appendix B contains a full list of the profiles of respondents who returned questionnaires.

Analysis of Data

The data has been collated and presented, in Chapter Four, in a form that follows the structure of the questionnaire. It is a combination of qualitative and quantitative data. In analysing the data the five step guide to interpretive analysis devised by Terre Blanche and Kelly (1999) has been followed as a combination of quasi-statistical and immersion/ crystallisation styles:

- i) Familiarisation and immersion
- ii) Inducing themes
- iii) Coding
- iv) Elaboration
- v) Interpretation and checking

Data analysis in the interpretative tradition involves becoming thoroughly familiar with a phenomenon, carefully reflecting on it and then writing an interpretation. This

analysis fitted with the epistemological position that was taken, in trying to move from the data to a theoretical position that could explain the decision to divert (Henwood and Pidgeon, 1993; Durrheim, 1999). The five steps are now considered in turn, followed by a brief section about the use of triangulation.

Familiarisation and Immersion

Hollway and Jefferson (2000:69) describe the effect of the process of immersion on their thinking as being similar to being inhabited by the data, in their case, from a single person:

After a whole day working on the transcripts of a particular participant (a process we often referred to as ‘immersion’) we would feel inhabited by that person in the sense that our imagination was full of him or her.

Terre Blanche and Kelly (1999:141) use similar language in relation to fieldwork texts. They suggest that this stage involves reading through the texts many times over, taking notes and “brainstorming”. The aim is to achieve a situation where the data is so familiar that it is known what can be found there and what sort of interpretations are likely to be supported by the data. It helps guard against the tendency to construct false patterns and to recall the data incorrectly.

The data was not only read and re-read but it was also typed out into a more manageable form, organised by the answers to each question, both to aid the analysis and to contribute to the process of immersion.

Inducing Themes

In this interpretative analytical tradition, themes should be inferred from the data, rather than being imposed upon it (Terre Blanche and Kelly, 1999). The themes that the data is organised into in Chapter Four of this thesis arose from the data and can be supported by it. Some subjects, such as restorative justice and adolescent sex offenders, were

identified as themes in the literature that was reviewed, so were considered before carrying out the fieldwork and are reflected in the questionnaire. The respondents themselves first highlighted other themes, such as the damaging effect of the criminal justice system. The choice of all the themes can be supported by the data.

The ten themes that were chosen have an 'optimal level of complexity' (Terre Blanche and Kelly, 1999:142). The possibility of having either more themes (e.g. by breaking up values and discrimination into many different sub-categories) or having fewer themes (e.g. by combining rehabilitation and bifurcation) were rejected. These decisions were made as a part of the process of immersion and of drawing themes; it was only through experimenting with many different thematic options that the number and nature of the final themes were settled upon.

Coding

The coding of data involves marking different 'bits' of data as being instances of a theme (Terre Blanche and Kelly, 1999). This was done firstly in a broad, general way by retyping the data and organising it into the answers to each of the questions. As stated above, this was also part of the process of immersion.

The second stage of the coding process involved physically marking on the texts the 'bits' of data that related to each of the themes. It was found that the first stage of the coding process was appropriate to do by computer but the second stage could best be done by hand on the printed document. The advantages of this approach were firstly that it necessitated reading and re-reading the responses, again contributing to the process of immersion and secondly responses could be marked as matching more than one theme.

The processes of coding and of inducing themes were necessarily intertwined. As the material became familiar and themes were noticed they could be coded, and it was the process of coding that aided the settling on the optimal level of complexity. Finding the

optimal level of complexity required a procedure of open coding (Kelly, 1999b) to be followed, where new codes could be used if the existing ones did not fit the data. This method fitted with Kelly's (1999b) suggestion that the development of themes and patterns is an ongoing one, where questions lead to further questions.

Elaboration

Elaboration is related to the technique of sampling to redundancy where the data is read and analysed repeatedly until no new insights can be drawn (Terre Blanche and Kelly, 1999; Durrheim, 1999). This allows finer nuances to be drawn and codes and themes to be reconsidered. This was done with the data and the recoding process was continued until it seemed that no new insights could be drawn.

Interpretation and Checking

Putting together the final document is the last stage of the analysis (Terre Blanche and Kelly, 1999). The analytical part of this thesis (Chapter Four) uses the thematic categories from the analysis as sub-headings. The process of compiling and writing this chapter allowed the processes and interpretations to be checked both against the data and against any possibility of bias in the subjective interpretations.

Relationship between Theory and Research Practice

Bottoms (2000) outlines a form of adaptive theory, a combination of grounded theory and hypothetico-deductive theory, that reflects the relationship between the data gathered and the theory used in this research. This involves working outward from the data towards a theory, while acknowledging that there are no theory-neutral facts and that any theory should be seen as a process, and work should not be closed too quickly. This adaptive theory makes use of both qualitative and quantitative data.

This research follows this approach in that the data is compared against the theory suggested. The research is set in the context of a transitional child justice regime, so conclusions drawn are seen as part of a process of establishing sound child justice practice.

Triangulation

Triangulation entails collecting material in as many different ways as possible, and from as many sources as possible (Terre Blanche and Kelly, 1999; Francis, 2000). It can also relate to method triangulation, where data is analysed both quantitatively and qualitatively (Bottoms, 2000). Triangulation can allow a research question to be approached from more than one angle, so enhancing the validity of the final results (Mason, 1996). If it is possible to get the same or similar results from more than one source, for example from both interviews and literature, then that increases the validity of the findings (Francis, 2000; King, 2000).

In this research, data was gathered from all the relevant participants in the preliminary inquiry and is analysed both qualitatively and quantitatively. The use of four case vignettes, rather than just one or two, is also a form of triangulation. This ensures that conclusions are not just drawn from the attitude of respondents to one particular case which may not be representative of how they think in general. For example, if the case of Vusi or Peter is analysed in isolation it may lead to the conclusion that the respondents were more enthusiastic about diversion than was actually the case when all four case vignettes are considered.

The other process that was undertaken as part of the triangulation of data was a review of the relevant literature. Reviewing the literature is an important way of identifying a research question, a theoretical framework and a methodology (Kaniki, 1999). It also allows the research to be placed in its proper context (Kaniki, 1999). The literature review for this research included, firstly, the South African policy papers, committee minutes, internet sites, formal submissions, academic articles and draft legislation that

related to the Bill and secondly the international, theoretical literature that provided insight into the relevant theoretical perspectives.

Ethics

All research must be judged against ethical standards, the main purpose of which is to protect research participants and institutions employing researchers. Durrheim and Wassenaar (1999) identify three principles that are expressed in ethical guidelines. The first of these principles is that researchers must respect the autonomy of all participants in the research. The second principle is that of nonmaleficence, that the researcher should do no harm to the participants or to any other groups of people. The third principle is beneficence: that the research must be of some benefit. They go on to suggest ethical guidelines for research; these guidelines are in line with those suggested by the British Society of Criminology (BSC) in its Code of Ethics (BSC, 2003), particularly with regard to the researcher's responsibilities to research participants (BSC, 2003). This research also had to comply with the ethical requirements of the supervising institution, De Montfort University, and the project was approved by the Faculty Human Research Ethics Committee before it was permitted to go ahead. The way in which these guidelines have been adhered to is described below.

Consent

The principle of informed consent, which states that subjects should be informed of their participation in research, including information about possible consequences of participation, is an established ethical principle in research (Durrheim and Wassenaar, 1999; Jupp, 2000). It incorporates the principle that subjects should give their consent to being involved in research (Durrheim and Wassenaar, 1999; BSC, 2003). This ethical principle is also linked to issues of validity; it is argued that if subjects know that they are being researched and what the purpose of that research is, they are more likely to respond openly and honestly (Jupp, 2000).

There was complete openness about the research methods and purposes and permission was gained from all interviewees. A cover letter (see Appendix A) was given to each respondent that explained, in non-technical language, the nature and purpose of the research and made assurances about confidentiality. The point about consent was restated when respondents were interviewed, and when those who completed postal questionnaires were spoken to on the phone.

Confidentiality

Participants should be assured of the confidential nature of the research, their identity should be concealed from the final document and data should be securely stored (Durrheim and Wassenaar, 1999; BSC, 2003).

The postal questionnaires were anonymous when they were received. The only details available were those provided in section one of the questionnaire and in some cases, the postmarks on the envelopes. Face to face interviews, whether carried out individually or in groups, were obviously not anonymous but names were neither recorded on the notes taken nor on the typed copies of the questionnaire. Completed questionnaires are stored in a drawer in a locked filing cabinet.

The field of child justice in South Africa is a small one and it might be possible for an informed reader to identify an individual if their job title and town was known. For this reason the details provided in the thesis for individual respondents are restricted to their region and the job title. Only the briefest details are provided for the reformers who were interviewed, as they could be even easier to identify. Where it was considered that it might be possible to identify respondents from even the brief details provided this was explained to them and they were content to proceed on this basis.

The use of fictitious cases meant that confidential information was not being sought about any actual young people involved in the criminal justice system. This avoided the potentially complex ethical issues involved in discussing real offences with offenders or

the people who worked with them (BSC, 2003; Walters, 2003). Although respondents occasionally provided examples from their own work to illustrate their answers, they were mindful of their own duty of confidentiality to their clients, and provided no identifying details. No identifying details of any young people appear in the thesis.

Competence

In carrying out research, it is the duty of the researcher to ensure that he or she is competent in the procedures required (Durrheim and Wassenaar, 1999). It is the researcher's responsibility to maintain and develop professional competence and integrity (BSC, 2003).

Research was carried out within an appropriate area of expertise, under supervision from experienced supervisors. There was no specialist practical or clinical training that was necessary for the performance of this research. The researcher had previously undertaken research training and carried out research in the criminal justice field as part of his Master's degree in Social Work at Queen's University, Belfast. In addition research skills training was undertaken as part of the De Montfort University doctoral programme.

Reporting Results

Results should be published with due regard to the rights of the participants, with care taken to preserve anonymity (Durrheim and Wassenaar, 1999). The publication of results from this research, both in this thesis, and elsewhere is done with this regard to the participants' rights, and care has been taken to preserve the respondents' anonymity.

In addition to the ethics outlined, Hollway and Jefferson (2000) identify three appropriate principles for researching subjects:

Honesty

Honesty entails approaching data openly and in a spirit of enquiry, not ignoring evidence that did not suit and only making such judgments as could be supported by evidence (Hollway and Jefferson, 2000). It is contended that this data has been analysed with integrity and that the conclusions drawn are evidence based. The data is presented in detail before it is analysed, allowing the reader to assess the analysis.

Sympathy

It is important that the treatment of the subjects is sympathetic and non-judgmental (Hollway and Jefferson, 2000). This was done in this research, firstly in the steps that were taken to gather data in a way that suited the participants: providing them with a choice of methods to have data collected, arranging to see them in their offices at times that suited them and being flexible in rearranging appointments when necessary. Secondly, their responses are treated with sympathy and put in the necessary context that decisions were being made by busy workers who often struggled to gain time, training or resources. Conclusions drawn relate to issues of training and organisation of the system and do not criticise individuals.

Respect

Hollway and Jefferson (2000) argue that the primary ethical responsibility of a researcher is to respect participants in the sense of paying attention to them and observing carefully. The measures that were taken, outlined throughout this chapter, to gather and analyse data are respectful towards the research subjects and this research has been carried out in compliance with ethical principles.

Part of the principle of respect relates to power relationships. Smith and Wincup (2000) suggest that the traditional view of a powerful researcher investigating a powerless

subject is over-simplistic, and this was true in this research. All of the interviewees were in powerful positions, albeit to significantly varying degrees, and had been specifically selected because they had decision-making power over children in the criminal justice system. Nevertheless, it was important to be aware of the researcher's potential power to exploit or misrepresent them. With sensitivity to this power, steps were taken to provide the interviewees with as much control over the process as possible, for example by interviewing them in their offices, at a time of their choosing, and offering them the option of being interviewed alone or with colleagues, of reading the questionnaire before the interview or of taking it away with them to complete after the interview. In discussions on the questionnaires it was possible to identify with the interviewees, in light of personal experiences of working in Youth Courts, and this enabled the building up of rapport and empathic understanding. However, there was a need to retain an acknowledgement of the differences in role, in that the primary purpose of the interviewer was gathering data for the research (Smith and Wincup, 2000).

Political Considerations

The carrying out of criminological research is an inherently political enterprise (Hughes, 2000; Morgan, 2000; Walters, 2003) and it is important to understand the political context in which research is carried out (Hudson, 2000). This is particularly true in a transitional society such as South Africa. It was important to remain aware in carrying out the research of both the political context and the criminological traditions of the country.

The three main traditions in South African criminology (Van Zyl Smit, 1999) were outlined in the previous section, with particular reference to children's rights. Criminologists have responded to the new South Africa by combining active participation in the reconstruction of the country with theoretical analysis although few criminologists have been able to achieve these simultaneous goals (Dixon, 2004).

Criminological writing on child justice in South Africa during the transition period of the 1990s and the 2000s has almost entirely focussed on advocacy. It could indeed be argued that it is a 'luxury' (Van Zyl Smit, 1990:10) to be able to take a more critical and abstract approach to the subject. Academics also express a support for government that is rarely seen in British writing, sometimes motivated by a desire to maintain influence, or by a residual loyalty to the ANC from its time as an opposition movement. An example of this is in Ramphela's (1997:1196) work on youth violence where she states the need for structural change but concludes by saying:

It is gratifying to note that the new government in South Africa has focused the reconstruction and development of the post-apartheid environment for youth along lines very similar to the ones proposed here.

It is difficult to imagine many British criminologists expressing similar sentiments about their government.

Travers (2001) has argued that a key assumption in taking a critical approach to theoretical or empirical work is that the analyst has a superior insight to those of the research subjects. This approach has been generally avoided by South African child justice reformers until such times as the more urgent matter of seeing child justice legislation enacted has been achieved. This research was carried out in an awareness that being able to analyse the Bill and the process of implementing it at a late stage in its development, and at a distance, was a privileged position to occupy.

Limitations of Methods Used

At the end of the study it is worthwhile to reflect on the research process and consider what could have been done differently and what lessons have been learned. This will be done in four sections: the effects of unexpected factors on the research, the influence of resource constraints, any reservations about the honesty of the respondents and finally how the methods could have been improved.

The Effects of Unexpected Factors on the Research

The whole research process was carried out in somewhat of an atmosphere of uncertainty. The protracted nature of the process to introduce the Bill is described in detail in Chapter Two of this thesis but one of the features of the process has been that there has long been expectation that enactment of the Bill was imminent. It was always a possibility that the Bill could be enacted at an inopportune time for this research, such as following the pilot of the questionnaire or actually during the fieldwork. This did not occur, and the Bill continues to await enactment.

A second risk connected to carrying out the research prior to the enactment of the Bill was that, during the parliamentary process, changes could be made to the Bill that could render part or all of the research irrelevant. Changes have been made to the Bill and when it is finally enacted there will be some differences to the version on which the questionnaire is based. Some of these changes are relatively minor, such as the omission of certain types of diversion options from the list of options in the Bill that appear on pages 4 – 5 of the questionnaire. These changes, and the uncertainty regarding what diversion options will be contained in the final version of the Bill did affect the analysis of this part of the research, and this is discussed later in the thesis.

The status of the Bill remains uncertain at the time of writing and this also has an effect on the analysis of the data. The Department of Justice Portfolio Committee has discussed drafts of the Bill on two occasions and has recommended changes, both to the process of the preliminary inquiry and to the categories of offenders that can be considered under the regime of the Bill. However, no updated version of the Bill has been published, the rewritten drafts have only been circulated internally. The context in which the outcomes of the research can be explained remains uncertain.

This atmosphere of uncertainty, although inconvenient, could not be considered to be surprising. Since the fall of apartheid, child justice in South Africa has been characterised by uncertainty as to the nature and timing of new legislation. The use of fictional case vignettes and open questions, without too narrow a focus on either

existing or anticipated legislation, allowed data to be gathered that would be of some use regardless of when or in what form the Bill was enacted.

The Influence of Resource Constraints on the Research

The research was constrained by resource limitations; it was also somewhat limited both by financial restrictions and by time constraints. The research was carried out by a PhD student, working alone, with no external funding. The time available was limited, both by the constraints of the supervising education institution and, more pressingly, by the work permit provided by the South African government. Some of these constraints have been discussed previously in this chapter; some of the particular restrictions included the difficulties in travelling around the area in which the research was being carried out, the consequence of this being that most of the research was dependent on the use of postal questionnaires.

Another limitation was related to the fact that it was not possible to remain in South Africa after completing the fieldwork. This meant that it was not possible to return to the field for any reason, such as to discuss the interpretations and conclusions with the professional research subjects, or to gather more information from other possible subjects. However, a considerable amount of data was gathered in the relatively short period of time that was available.

The Honesty of the Respondents

There were no reservations about the honesty or accuracy of the answers that were given; by asking respondents to explain their answers it was possible to check that their positions and their responses were consistent. It has been established that in interviews it is possible for the researcher to have an effect on the respondents (Durrheim, 1999) so that the respondents give the answer that they think that the researcher expects. In both individual and group interviews, effort was made to give no clues as to what was an acceptable answer. The questionnaire that was posted to respondents also provided no

clues as to whether a particular answer would be more acceptable than any other. It is also difficult to see what would have motivated a respondent to be dishonest; there were no responses that seemed to be more desirable than others.

There were significant differences in the amount of knowledge that respondents had and training that the respondents had received in the Child Justice Bill, but this did not diminish the research as it was simply a reflection of the child justice regime at that time: that practitioners with different levels of knowledge and training were expected to operate a consistent regime.

How Methods could have been Improved

As stated above, it would have been desirable to directly observe the preliminary inquiry process but this would have been impossible to do prior to the administration of the Bill. It remains the case that the use of a questionnaire based on case vignettes was the best way to answer the research question.

There are a number of minor changes that might have been made to the questionnaire in retrospect. The first of these is in section one where the respondents were asked to state their race, using categories from the South African census. One interviewee asked about the categories that were used and was satisfied when it was explained where they had been taken from. It may have been better to state explicitly on the questionnaire that census terminology had been used as those who completed the questionnaire by post might have had a similar question to this respondent but not been able to seek clarification. It is possible that respondents who were not clear about this, or about other aspects of the questionnaire, may have been deterred from completing it at all.

The third and fourth questions in part two, that related to the availability of diversion options, may have been over-reliant on the list of options in the draft Bill, and were sometimes slightly unclear to the respondents. There seemed to be confusion about diversion and sentencing options and about options that they had heard about but not yet

seen. Again, this uncertainty could have been more a product of the confusing child justice regime at that time than of any flaw in the questionnaire but nevertheless a more open question might have been more appropriate. This question could have been worded:

“What interventions do you know of in your area that can be used for young people in trouble with the law, either as a diversion option or as a form of sentence?”

The administration of the fieldwork could have been done differently had more resources been available. Ideally, a higher proportion of the respondents could have been interviewed instead of information being gathered by postal questionnaires. It would have been particularly desirable to have been able to interview more respondents outside Cape Town, in the rural Eastern and Western Cape. However, within the resources available it is difficult to see how the administration of the fieldwork could have been significantly improved.

Conclusion

The methods used to gather and analyse data have now been explained. In the next chapter the data gathered will be presented before it is analysed thematically in chapter five.

DATA PRESENTATION

The data for this thesis was collected over a six-month period in 2002 and 2003. As outlined in the methods chapter, information was collected through a combination of postal questionnaires, hand-delivered and collected questionnaires and face-to-face interviews both with individuals and with groups. In total information was gathered from 67 individuals.

In this chapter the profile of the 62 practitioner respondents will be described and their responses to the questionnaire will be outlined. The data in this chapter will be presented following the structure of the questionnaire: respondents' profile, attitude to the Bill, then the responses to the four case vignettes. Additional general comments that some respondents made will be presented followed, finally, by the responses of the five reformers.

Profile of Respondents

Professions

The respondents were chosen by profession. Questionnaires were completed by 32 probation officers (48% of the total questionnaires returned), 20 prosecutors (30%), 10 Magistrates (15%) and 5 reformers (7%): a total of 67 respondents.

The data presentation from this point on will exclude data received from the reformers; that will be presented and analysed later in this chapter.

Table 2 shows the response rate from each of the professions, by region. The higher response rate from Cape Town is likely to be reflective of the fact that more of the questionnaires were delivered by hand there, or administered in interview. In the Eastern Cape all methods of distribution were used and in the rural Western Cape postal distribution was the sole method used.

Table 3 shows the responses, by profession. The disparity in the number of questionnaires distributed reflects both the relative numbers of each of the professions working in the field of child justice and the number of child justice specialists in each field. Probation officers are the most likely to describe themselves as working solely with children, and some prosecutors are solely employed in the Child Court. Magistrates are less likely to be specialists in the area. Information about the magistrates' views is treated with caution due to the small size of the sample.

As explained in the methods chapter, for the purpose of the presentation and analysis of these data 'probation officers' is used as a general term to include all who carried out that function as at least part of their work.

Table 4: Racial identity of respondents

	Eastern Cape		Western Cape		Total	
	Number	Percentage	Number	Percentage	Number	Percentage
Black African	17	54.8	5	16.1	22	35.5
Coloured	3	9.7	13	41.9	16	25.8
Indian/ Asian	3	9.7	2	6.5	5	8.1
White	7	22.6	9	29.0	16	25.8
Not specified	1	3.2	2	6.5	3	4.8
Total	31	100	31	100	62	100

When the information in Table 4 is compared to the overall racial composition of South Africa it appears that white people are over-represented, compared to the population as a whole (South African Census, 2001), illustrated in Table 5. The figures are more representative of professionals within the criminal justice system where black people have been traditionally under-represented (Dissel and Kollapen, 2002). Although the

post-apartheid government has made attempts to redress the racial imbalance of staff groups within the criminal justice system, this process has not been well managed, and the goal of equity has not yet been met (Dissel and Kollapen, 2002).

Table 5: Information on race from the South African Census 2001

Racial Group	Eastern Cape	Western Cape	South Africa
Black African	87.5	26.7	79.0
Coloured	7.4	53.9	8.9
Indian or Asian	0.3	1.0	2.5
White	4.7	18.4	9.6
Total	100.0	100.0	100.0

As stated in the methodology the racial classification categories were the same as those used in the most recent South African census. As some of these terms remain contested the respondents were offered the opportunity to describe their racial identity in their own words. None chose to do so in this research and so few chose to do so in the census that the category was removed when the results were analysed (South African Census, 2001).

As the tables 6 and 7 demonstrate, the respondents were predominantly female, especially in the Western Cape. Both the prosecutors and probation officer samples were overwhelmingly female but the majority of magistrates were male.

Table 6: Respondents' gender by region

Gender	Eastern Cape		Western Cape		Total	
	Number	Percentage	Number	Percentage	Number	Percentage
Male	12	38.7	4	12.9	16	25.8
Female	18	58.1	25	80.6	43	69.4
Not specified	1	3.2	2	6.5	3	4.8
Total	31	100	31	100	62	100

Table 7: Respondents' gender by profession

Profession	Male	Female	Not specified	Total
Probation Officers	7	23	2	32
Prosecutors	4	15	1	20
Magistrates	5	5	0	10
Total	16	43	3	62

Table 8: The type of area in which the respondents work

Region	Type of area	Number	Percentage of region	Percentage of whole sample
Eastern Cape	Rural	7	22.6	11.3
	Urban	8	25.8	12.9
	Mixture of rural and urban	16	51.6	25.8
Western Cape	Rural	5	16.1	8.1
	Urban	22	71.0	35.5
	Mixture of rural and urban	4	12.9	6.5
Total		62	-	100

The majority of respondents worked for at least part of the time in urban areas, and most of those worked in the major urban centres of the two provinces: Cape Town in the Western Cape and Port Elizabeth or East London in the Eastern Cape. However, the large number of respondents who worked in both rural and urban areas meant that over half the respondents (52%) did at least some work in rural areas.

Table 9: Percentage of time that the respondents spent in working with children

Percentage of time spent in work with children	Eastern Cape		Western Cape		Total	
	No.	%	No.	%	No.	%
0 – 25	5	16.1	2	6.5	7	11.3
25 – 50	8	25.8	3	9.7	11	17.7
‘A minority’	1	3.2	-	0	1	1.6
50 – 75	6	19.4	4	12.9	10	16.1
75 – 100	2	6.5	10	32.3	12	19.4
100	7	22.6	12	38.7	19	30.6
Not specified	2	6.5	-	0	2	3.2
Total	31	100	31	100	62	100

Table 9 illustrates that there was a geographical disparity with regard to how much of their employment time each respondent spent working with children. It is striking that when expressed as a percentage there were over twice as many practitioners in the Western Cape (71%) as in the Eastern Cape (30%) who worked for at least 75% of their time with juveniles. In the Eastern Cape there appears to be much less opportunity to specialise in work with children, with the only significant exception being in the One Stop Centre.

Table 10: Length of time spent in working with child offenders

Length of time	Number	Percentage
Less than a year	5	8.1
1 – 2 years	12	19.4
2 – 5 years	14	22.6
6 – 10 years	9	14.5
More than 10	12	19.4
Not specified	10	16.1
Total	62	100

There was significant diversity in the amount of experience that the respondents had had in working with children, as shown in Table 10. The answers ranged from a prosecutor who had been working for less than a month in the child court to a magistrate with 24 years experience. Seventy-four per cent of respondents had over two years experience in working with child offenders, putting them in a strong position to respond to the questionnaire.

The Child Justice Bill

This section of the questionnaire was designed to elicit information about how prepared the respondents are for the introduction of the Bill, how committed to its principles they are and what resources for its implementation were already available in the areas where they work.

How prepared would you say that you were for the introduction of the Child Justice Bill?

What preparation have you received? Please specify.

Table 11: Practitioners’ preparedness for the introduction of the Bill, by region

Response	Eastern Cape		Western Cape		Total	
	No.	%	No.	%	No.	%
Very well prepared	4	12.9	2	7.1	6	10.2
Prepared	11	35.5	8	28.6	19	32.2
Partially prepared	11	35.5	6	21.4	17	28.8
Unprepared	3	9.7	7	25	10	16.9
Very unprepared	2	6.5	5	17.9	7	11.9
Total	31	100	28	100	59	100

The figures show that in both provinces there has been some preparation but that the amount has not been consistent or extensive. Many current child justice practitioners have received little or no training on the Bill. Over a third of practitioner respondents stated that they had been well prepared or very well prepared but the majority stated that they were insufficiently prepared. Table 12 breaks the answers to this question down into professions.

Table 12: Practitioners’ preparedness for the introduction of the Bill, by profession

Response	Probation Officers		Prosecutors		Magistrates	
	Number	Percentage	Number	Percentage	Number	Percentage
Very well prepared	3	10	1	5.6	2	18.2
Prepared	15	50	3	16.7	1	9.1
Partially prepared	9	30	5	27.8	3	27.3
Unprepared	3	10	6	33.3	1	9.1
Very unprepared	0	0	3	16.7	4	36.4
Total	30	100	18	100	11	100

Probation Officers

In answer to the question about what preparation they have received, there is generally much greater satisfaction expressed by the probation officers than by the legal professionals. However, this was not true of all probation officers; some said that they had not received any training. One probation officer, although she said that she was prepared herself, provided a possible explanation as to why some probation officers had been well trained and others had not yet been trained at all:

Training is a contentious issue, people in the local office feel that everyone should go but probation work is treated as if it is elite, only current probation officers and their supervisors are allowed to go. Social workers change their roles every three years. (#32, Probation Officer)

It seems that in some areas staff are rotated between different jobs and only those who are currently fulfilling a particular role, for example as a probation officer, are able to attend training. This means that all training is lost to the organisation every time jobs change, as those who have received training get moved to a different post and untrained

staff take up their post. There was frustration expressed about what were seen to be the persistent changes and updates in youth justice provision, and the gap between what they were being prepared for and what was actually happening.

Prosecutors and Magistrates

Although some of the prosecutors and magistrates said they were prepared or very well prepared for the Bill there was little evidence of any systematic attempt to train them in it. One prosecutor said that she had attended training in the Bill but none of her other colleagues suggested that they had had a similar opportunity:

We are very well prepared in Cape Town, most set-ups are already organised for. We have had several training meetings, some facilitated by the Community Law Centre at the University of the Western Cape. (#45, Prosecutor)

Others who described themselves as prepared had done personal research:

I printed the Bill from the World Wide Web and studied it. (#30, Prosecutor)

The group of criminal justice professionals who described themselves as unprepared or very unprepared (comprising over 40% of the sample, and over half the prosecutors) tended not to expand on that beyond saying that they had received no training. However some took the opportunity to express their frustration and to imply that the failure to provide nationwide training was likely to be followed by a failure to properly implement and fund the Bill:

In this area we do not know anything about the Child Justice Bill, or about new plans for introducing diversion schemes – we are always the last to hear about anything. We are very sceptical about the likelihood of the Bill being introduced and implemented. If the government cannot even provide antiretrovirals for babies who have AIDS then it is not very likely to build a Juvenile Court for us. (#54, Prosecutor)

One of the principles that the Child Justice Bill is based on is that some young offenders should be diverted away from the criminal justice system. Do you agree with this principle?

In respect of diverting some children, there was overwhelming agreement across all geographical areas and all three professions:

Table 13: Practitioners’ level of agreement with the principle of diversion

Response	Total	Percentage
Strongly agree	30	52.6
Agree	23	40.4
Neither agree nor disagree	2	3.5
Disagree	2	3.5
Strongly disagree	0	0
Total	57	100

In answer to the above question, there were a number of reasons given for why children should be diverted away from the criminal justice system. The first was that minor or first offenders should be given an opportunity to address their behaviour outside the formal system:

I think those who committed petty offences and those who are first offenders should be diverted away from the criminal justice system as they are not going to go deeper into the system. (#2, Probation Officer)

Secondly, the deprived communities that a lot of child offenders come from were referred to:

Most child offenders come from disadvantaged backgrounds and commit crime for economic reasons. Children who are hungry should not be prosecuted for stealing cheese, chocolate or takkies [training shoes]. (#33, Probation Officer)

Thirdly, some respondents thought that children should be spared from the damaging effects of criminalisation and incarceration:

They do not have any future if you take them to jail, there is no possibility of rehabilitation, they need to be given the chance to rehabilitate themselves. (#53, Magistrate)

However, many of those who advocated for the greater use of diversion insisted that it only be used for first time or minor offenders and qualified their agreement to the principle either with a reference to the child's age, or previous clear record.

The two respondents, both prosecutors, who disagreed with the principle of diversion, did so because they were concerned that more serious offenders, either adults or children, would escape justice under the new regime:

In serious cases such as rape when child is severely traumatised and suffers physical injury, diversion should not be an option. (#26, Prosecutor)

The responses indicate that there does seem to be almost universal agreement with the principle of diverting first time child offenders but that plans to divert more serious or persistent offenders are likely to be more controversial. This is borne out by the responses to the case vignettes.

The Child Justice Bill provides a number of diversion options; some of these are listed below. Please indicate which of these are available to young people where you work.

The combination of the delay in the implementation of the Bill, the changes made to the list of diversion options subsequent to the administration of the questionnaires and the differing ways in which the respondents interpreted the questions meant that the data gathered in this section of the questionnaire has somewhat limited utility. Some of the diversion options listed were not available in legislation at the time that the questionnaires were administered so could only be used either in an informal way or as part of existing orders. In addition there was no formal mechanism for diversion so

respondents who said that an option was available were either referring to an informal process or a disposal as a whole or a part of a sentence.

The responses are revealing, however, with regard to what is currently considered for disposing of child offenders either by way of diversion or sentence. Only those respondents who have said that an option is available are likely to be currently using that order; if they do not know if it exists or they think that it might be introduced in the future then they will not utilise it for any children at present. Table 14 ranks the disposals in terms of perceived current availability.

Table 14: Practitioners’ perceived availability of diversion options

Rank	Diversion Option	Number who said that option was available
1	Community Service Order	50
2	Restorative Justice (including FGCs, VOMs and other processes)	46
3	Supervision Order	44
4	Oral or Written Apology	39
5	Formal Caution	37
6	Counselling or Therapy Order	36
7	Victim Reparation Order	30
8	Compensation Order	29
9	Residential Order	26
10	Attendance Centre Order	23
11	Reporting Order	22
12	Compulsory School Attendance Order	21
13	Good Behaviour Order	18
14	Order prohibiting a child from visiting a specified place	14
15	Family Time Order	11
15=	Positive Peer Association Order	11

It was clear from the answers that some of the respondents gave both to this question and to later questions that there was some confusion about the terminology relating to family group conferences and victim-offender mediation. The terms were often conflated or confused. For example respondents #14, #15, #16 and #17 (Probation Officers, interviewed as a group) said that they had thought that they were carrying out Family Group Conferences but had recently been told at a training event on the Bill that they were actually carrying out victim-offender mediation. In addition the provision for

'other restorative processes' was removed by the State Law Advisor after the questionnaire had been administered. For these reasons the responses regarding the availability of these three disposals have been combined to show that 46 respondents said that one or other form of restorative justice was available in the area where they worked.

The most available orders, as shown in Table 14, are the well-known orders of community service and restorative justice that are almost universally available. Further down the list come disposals that are available but do not yet exist as specific orders, such as supervision, apology and reparation and compensation. The least available orders appear in the Bill (although some have now been changed or removed) and will be new disposals. Those respondents who said that they were available were referring to semi-informal instructions given by a magistrate to a child as part of another sentence; one prosecutor described positive peer association thus:

Magistrate will tell children not to associate with particular individuals, but it has no legal authority. Difficult to see how this could be monitored. (#5, Prosecutor)

The respondents were also asked about other disposals that were available in their areas that did not appear on the list. The most commonly mentioned were the NICRO YES programme and SAYStOP programme. Other disposals mentioned included the President's Award Scheme (known in the UK as the Duke of Edinburgh's Award scheme), PEDRO (Programme for drugs related offences), Big Brother/ Big Sister (a mentoring programme), the DIME programme (a music programme that teaches children to play the marimba drums) and the Journey outdoors project. Some respondents also mentioned that it was possible to divert a child by converting the case to a Children's Court Inquiry.

Table 15: Practitioners’ perception of availability of diversion options

Option	Percentage of respondents in each area who said that it was available		Greater percentage who said it was available in the Western Cape
	Eastern Cape	Western Cape	
Attendance Centre Order	28	67	+39
Formal Caution	62	84	+22
Supervision Order	74	96	+22
Oral or written apology	63	84	+21
Residential Order	46	66	+20
Counselling or therapy order	67	86	+19
Reporting Order	39	54	+15
Community Service Order	86	100	+14
Victim Reparation Order	58	63	+5
Compulsory School Attendance Order	41	42	+1
Order prohibiting the young person from entering a specified place	31	29	-2
Other restorative processes	28	25	-3
Family Group Conference	81	77	-4
Family Time Order	26	17	-9
Good Behaviour Order	41	28	-13
Compensation Order	63	48	-15
Victim Offender Mediation	81	56	- 25
Positive Peer Association Order	35	8	- 27

The regional disparities shown in Table 15 are referred to in Chapter Four.

The responses are illustrative of the transitional state of South African Child Justice: the Bill has been publicised but not enacted. In some areas proactive NGOs and practitioners have introduced particular disposals that they have read about in the Bill but these are often used in an informal, extra-judicial manner. It seems that although diversion is being promoted in advance of the enactment of the Bill, it will not be until the Bill is implemented that diversion options will be introduced systematically across the whole country.

Practitioners’ Responses to the Case Vignettes

Four case vignettes were designed to discover how practitioners made decisions about diversion. The four case vignettes can be read in the appendix and the presentation will follow the structure of the questionnaire.

Q1: If this child came to your attention how likely would you be to recommend him or her for diversion?

Sipho

Table 16: Practitioners’ attitudes regarding diverting Sipho

Response	Probation Officers		Prosecutors		Magistrates		Total	
	No.	%	No.	%	No.	%	No.	%
Very likely	2	6.9	1	5.6	0	0	3	5.5
Likely	12	41.4	2	11.1	2	25	16	29.1
Unsure	2	6.9	3	16.7	1	12.5	6	10.9
Unlikely	10	34.5	5	27.8	2	25	17	30.9
Very unlikely	3	10.3	7	38.9	3	37.5	13	23.6
Total	29	100	18	100	8	100	55	100

Sipho had a number of previous convictions, and had been arrested for the theft of a compact disc. There was considerable reluctance to recommend Sipho for diversion. Only 34% of respondents said that they would be likely or very likely to recommend Sipho for diversion. Of the nine in the Western Cape who would have diverted him, four of those meant that they would have converted the case to a Children's Court Inquiry. The issues that that course of action raises will be discussed in the data analysis. The legal professionals, prosecutors and magistrates, were particularly reluctant to divert Sipho and this is also discussed in the data analysis.

There were two main reasons given for not diverting Sipho. Firstly, his lengthy criminal record led some respondents to believe that he should not even be considered for diversion:

Because of his previous record – all of the previous convictions are of a similar nature (where theft is element) not even correctional supervision deterred him – he is a candidate for direct imprisonment now! (#18, Prosecutor)

Secondly, and connected to this, Sipho's failure to respond to previous diversions led some to believe that he should not be given a second chance:

He has been through the programmes already; lifeskills and victim offender mediation. He definitely won't be a suitable candidate. (#45, Prosecutor)

Those who were inclined to recommend Sipho for diversion were persuaded that his recent change of circumstances meant that he should be given another chance to respond to diversion:

He is now staying with his mother and he needs to be given a chance, if he receives a lifeskills programme and his mother supports him in doing it then he could develop into a positive human being. (#53, Magistrate)

References were also made to Sipho's troubled childhood and to the desirability of diverting all children.

Vusi

Table 17: Practitioners’ attitudes regarding diverting Vusi

Response	Probation Officers		Prosecutors		Magistrates		Total	
	No.	%	No.	%	No.	%	No.	%
Very likely	11	37.9	3	16.7	4	50	18	32.7
Likely	12	41.4	9	50	3	37.5	24	43.6
Unsure	2	6.9	5	27.8	1	12.5	8	14.5
Unlikely	3	10.3	0	0	0	0	3	5.5
Very unlikely	1	3.4	1	5.6	0	0	2	3.6
Total	29	100	18	100	8	100	55	100

Vusi had no previous convictions but had committed a serious sexual offence against his sister. Over 75% of respondents said that they would be likely or very likely to divert Vusi, more than twice as many as were inclined to divert Sipho. Prosecutors were the least likely of the professions to divert him, but there were still two thirds of prosecutors who said that they would do so. Most of the respondents referred to the fact that he was a first offender and combined that with another reason to create a justification for diversion. The fact that he had been drinking at the time of the offence was seen as a mitigating factor:

Since he is a first offender and was under the influence of alcohol he was not sure what he was doing. (#9, Prosecutor)

His good school record was also considered to be a reason for diverting him, as was his perceived remorse:

He does not have uncontrollable behaviour, he attends school and progresses well, he is not a troublesome child. He also admits to the offence, he said that he was very sorry. (#37, Probation Officer)

Peer pressure was seen as a factor influencing his behaviour and was also considered mitigating:

Due to his age, his positive previous record, remorse and current offence which is sexual assault instead of rape I think he deserves another chance. Maybe peer pressure played a role, he is maybe scared of girls, things happen under pressure, it is possible when he is drunk. (#39, Probation Officer)

There was a general tendency to attribute positive factors to Vusi, who was described variously as ‘a good kid’, ‘intelligent’ and having ‘so many strengths’. There was not always strong evidence for these assertions in the original case vignette. There was also optimism expressed about the likelihood of his avoiding offending behaviour in the future:

With a clean life up to this incident and with the remorse shown it is unlikely that something like this will happen again. (#29, Magistrate)

There were a small number of respondents who were reluctant to recommend Vusi for diversion and they were concerned about the seriousness of the offence:

Because of the seriousness of the offence – especially in the time and climate we live in relating to sexual offences where children are the victim and the fact that it is his own sister. (#18, Prosecutor)

Interestingly, a number of factors were quoted to draw opposite conclusions by the respondents; the quotation above refers to the fact that the victim was his sister as an aggravating factor; another respondent saw that as mitigating. Different respondents also interpreted his attitude to the offence and the dispute over the facts in different ways.

Peter

Table 18: Practitioners’ attitudes regarding diverting Peter

Response	Probation Officers		Prosecutors		Magistrates		Total	
	No.	%	No.	%	No.	%	No.	%
Very likely	9	31.0	6	35.3	5	62.5	20	37.0
Likely	16	55.2	7	41.2	2	25	25	46.3
Unsure	2	6.9	1	5.9	1	12.5	3	5.6
Unlikely	1	3.4	3	17.6	0	0	5	9.3
Very unlikely	1	3.4	0	0	0	0	1	1.9
Total	29	100	17	100	8	100	54	100

Peter had a clear record, came from an affluent background, and had stolen a car belonging to the parents of one of his friends. Over 83% of respondents said that they would be likely to divert Peter, the highest percentage for any of the case vignettes. No magistrate said that they would be unlikely or very unlikely to divert him, and although prosecutors were again the least likely to divert Peter, over three-quarters said that they were likely or very likely to divert. The fact that Peter is a first offender was considered to be the most important factor by the respondents who were keen to divert him. Other personal factors were seen as positive and likely to contribute to him avoiding future offending and cooperating with the diversion programme:

He is a first offender, goes to school, progressing satisfactorily, no previous anti-social behaviour, very stable family, parents would like to assist him with particular problem. (#15, Probation Officer)

One respondent referred specifically to Peter’s race as a reason for diverting him, suggesting that car theft was not taken too seriously amongst white people:

Considering the fact that Peter is white, even though it is not right, for them this is not such a big/serious offence. (#1, Probation Officer)

Some of the respondents who were inclined to divert Peter were concerned about the seriousness of the offence that he had committed but they believed, from their experience, that there might be a way of resolving this:

A case like this happened exactly, recently in [a local town], we called the family in and consulted with them, they said that they did not want the child to have a record. We could then charge him with driving without the owner’s consent and divert him. (#46, Prosecutor)

It was the nature of the offence, including the amount that was stolen that concerned those respondents who were unlikely or very unlikely to divert Peter:

Accused is charged with a very serious offence. He is fully criminally liable, cannot be treated differently because he comes from a privileged background. Should himself take responsibility for the offence. Action was also pre-meditated. (#43, Probation Officer)

Zanele

Table 19: Practitioners’ attitudes regarding diverting Zanele

Response	Probation Officers		Prosecutors		Magistrates		Total	
	No.	%	No.	%	No.	%	No.	%
Very Likely	10	35.7	2	12.5	5	62.5	15	29.4
Likely	10	35.7	6	37.5	2	25	19	37.3
Unsure	0	0	2	12.5	1	12.5	3	5.9
Unlikely	7	25	5	31.2	0	0	12	23.5
Very unlikely	1	3.6	1	6.2	0	0	2	3.9
Total	28	100	16	100	8	100	51	100

Zanele had assaulted a school friend, she had a previous caution for a similar assault against the same victim. Of all the case vignettes there was the greatest disparity in views about Zanele; about two thirds of respondents were likely or very likely to

recommend her for diversion but over a quarter were either unlikely or very unlikely to make such a recommendation. The exception to this was in the responses of the magistrates, none of whom said that they were unlikely or very unlikely to divert Zanele. Among the prosecutors and probation officers there were strong views expressed in each direction. Those who were likely to recommend her for diversion emphasised that she had never undergone a diversion programme before and that they would like her to do so:

In the previous offence she was cautioned formally, an intervention of a professional is needed for her to be aware of the consequences of re-offending. (#1, Probation Officer)

Her age, background, lack of previous convictions and difficult family history were also considered to be factors:

She is not a bad girl, she is only 14, she has unsolved emotional baggage, no father figure and she is acting out. It is only her second offence. (#32, Probation Officer)

Some respondents believed that Zanele's actions were within the realms of normal teenage behaviour and one managed to convey this in a one-word answer:

Kids... (#30, Prosecutor)

The respondents who said that they were unlikely to divert Zanele were concerned about her lack of remorse and the fact that she had reoffended after having previously been given a chance:

She is a rude person who is unapologetic and a repeated offender who promises to do the same again. (#3, Magistrate)

The other reason given for not diverting Zanele was that she would be more appropriately dealt with by the Children's Court than by the criminal court so conversion would be more appropriate than diversion:

The family has problems and they need to be addressed. Should assess whether the mother can control her; recommend that she be sent to the Youth Care Centre. This could be done via conversion to a Children's Court Inquiry or directly from the criminal court. (#35, Probation Officer)

Table 20: Practitioners' attitudes regarding diverting all four young people

Response	Sipho	Vusi	Peter	Zanele
Likely or very likely	35	76	83	67
Unsure	11	15	6	6
Unlikely or very unlikely	54	9	11	27

Table 20 illustrates a very clear priority in how likely the respondents were to divert each of the young people; they were most likely to divert Peter, followed by Vusi, then Zanele with Sipho the least likely to be diverted.

Table 21 shows the relative likelihood of each profession to divert, indicating that it is prosecutors who are least likely to divert a child away from the criminal justice system. The magistrates interviewed were much more likely to divert than the prosecutors and in three of the four cases (Vusi, Peter and Zanele) were more inclined to divert than the probation officers were. Regional variations in responses will be discussed in the next chapter, data analysis, and as Table 22 shows, the use of diversion was almost identical in the Eastern and Western Cape.

Table 21: Practitioners’ attitudes regarding diversion, by profession

Response	Probation Officers (%)	Prosecutors (%)	Magistrates (%)
Likely or very likely to divert	71%	52%	68%
Unsure	5%	16%	13%
Unlikely or very unlikely to divert	23%	32%	19%

Table 22: Regional variation in recommending diversion

Response	Eastern Cape (%)	Western Cape (%)
Likely or very likely	64	65
Unsure	9	10
Unlikely or very unlikely	25	25

Q2: Which one fact about this child had the greatest influence on your decision?

Table 23: Factors influencing the decision to divert

Response	Sipho		Vusi		Peter		Zanele		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
Personal Circumstances	26	49.1	24	45.3	27	52.9	26	54.2	101	49.3
Previous Record	25	47.2	23	43.4	18	35.3	24	50	82	40.0
Attitude	11	20.8	14	26.4	17	33.3	17	35.4	69	33.7
Current Offence	3	5.7	13	24.5	17	33.3	10	20.8	43	21.0
Other	0	0	2	3.8	4	7.8	3	6.2	10	4.9
Total	53	-	53	-	51	-	48	-	205	-

Sipho

Some of the initial reasons given in the answers to the first question were reiterated in the responses to the second question. Those who said that his previous record was a reason not to divert him again referred to both the offences that he had committed and his response to previous interventions:

He has been through programmes before, my attitude is if the child has had opportunities and not taken them then I will impose harsher measure. (#42, Magistrate)

Personal circumstances were referred to both by those who wanted to divert Sipho and those who wanted him to be prosecuted. His background and experience of abuse were seen by some as the cause of his offending:

Sipho's father is to be blamed for Sipho's current behaviour. We heard that Sipho grew out of an abusive environment, is a victim of physical abuse by his biological father. (#4, Probation Officer)

There was a divergence of opinion with regard to how to interpret the recent changes in Sipho's life. Some considered it to be in his favour that he was now back in a relationship with his mother while others felt that the fact that he had continued to offend despite his new circumstances should be counted against him.

Eleven respondents said that they would be influenced by Sipho's attitude. There was little information provided in the case vignette about his attitude and the respondents have extrapolated from that to reach some very different conclusions about what his attitude might be:

His attitude shows that he is willing to change and he recognises that what he did was wrong. (#20, Probation Officer)

Apart from his list of previous convictions is Sipho's attitude one of ignorance and no respect towards the law. (#29, Magistrate)

The current offence, a very minor one, was only alluded to by three respondents, and none of them expanded on how that might influence them.

Vusi

For many respondents Vusi being a first offender was sufficient reason to divert him regardless of any other factors. Respondents believe that every child should be given one opportunity to undergo a diversion programme:

He was a good child up to now, he is still school going and he never had a chance on diversion. (#57, Prosecutor)

Personal circumstances, as in the responses to the previous question were taken to include his school record, his use of alcohol and the negative influences of his friends.

Respondents were keen to take these factors into consideration without being seen to minimise the offence:

His attitude and personal circumstances are positive, although it was a serious offence, it happened once, alcohol played a role and with the right help, he can be rehabilitated. (#60, Prosecutor)

The two respondents who selected 'other' referred to alcohol and age, respectively, factors that many respondents considered under the category of 'personal circumstances'.

As in the responses to the previous question, the category of 'attitude' meant different things to different people, most, but not all, thought that Vusi was remorseful; others were impressed with his attitude at school.

The current offence tended to be the most important issue for those who were unsure or unlikely to divert with some focussing on the dispute over the facts, stating that they would not be able or willing to divert if Vusi was charged with rape. For some, diversion was not seen as appropriate in such circumstances:

Diversion programmes available does not fit the seriousness of the offence. Stricter measures is necessary in order for the accused to realize the seriousness of his actions. (#43, Probation Officer)

Peter

Over half the respondents said that the one fact that would have the greatest influence on them with regard to Peter was his personal circumstances. This was the highest number of any of the case vignettes that considered personal circumstances to be the most important factor and one of only two instances where over half the respondents prioritised the one factor: the other occasion was in relation to Zanele's attitude in the fourth case vignette.

The most important personal circumstance according to many of the respondents was that Peter's parents were able and willing to pay the costs of the offence. That was often seen, in combination with some other personal factors as a justification for diverting him:

He is a first offender, his personal circumstances are good, current offence very serious but his father is willing to pay the damage. (#60, Prosecutor)

Other factors such as Peter's previously clear record and the temptation that he was put under were mentioned but it was striking how non-specifically positive many of the respondents were, to the extent of almost seeming to praise Peter:

There is almost nothing lacking in modelling a perfect child out of Peter. (#31, Magistrate)

Peter's clear previous record, his attitude and the nature of the offence itself were each considered important by approximately a third of the respondents. Some thought that the offence itself was so serious that he could not be diverted but others were so impressed by other factors that they were prepared to consider the offence to be relatively minor. Similarly, with regard to Peter's attitude, most considered it to be a positive factor but there were a few who thought differently:

I was impressed by his honesty, attitude and very positive personal details. (#41, Prosecutor)

He stated that he always wanted to drive a Mercedes. He is spoilt and has no regards for the rights of others. (#44, Probation Officer)

Zanele

Zanele was the only one of the case vignettes whose attitude was considered to be the most important factor in the decision to divert. This was almost universally considered to be a negative factor and she was variously described as rude, angry, aggressive, disruptive, disturbed and lacking remorse. Two respondents were, however, prepared to

look beyond Zanele's initial presentation; one said that even if her attitude was wrong the relatively trivial nature of the offence meant that she should be considered for diversion. Another respondent suggested that Zanele's attitude should not be taken at face value but should be explored further:

I would not avoid diversion because of her lack of remorse: who did she say she was not sorry to? Up to this point she has not received services, hasn't been given a chance why she does not feel sorry. (#17, Probation Officer)

Those who were more sympathetic to Zanele considered her personal circumstances to be an important factor and many respondents identified the fact that she had never known her father as an influence on her behaviour:

The fact that she has lived with her mother alone has a negative impact on her, in fact this causes anger in her. (#31, Magistrate)

Those who considered Zanele's previous record to be important saw it as a negative factor despite the fact that she had only one previous caution. The current offence was also seen as counting against Zanele because it involved violence.

The respondents who considered something other than the options listed to be the most important factor said that they would be influenced by the probation report, the fact that Zanele had not previously been diverted and, in one case, the attitude of the victim:

The determining factor would be the attitude of the complainant. If the complainant did not want a Family Group Conference then I would ask for a pre-trial report. I'm very reluctant to proceed with assault cases that occurred at school, often something can be arranged. (#45, Prosecutor)

Overall, personal circumstances and previous record were considered to be important in all the case vignettes, attitude was considered to be particularly important in relation to Zanele's case. The low priority given to consideration of the current offence is reflected in the answers to the previous question where those who had committed serious offences were more likely to be diverted than those who had committed more minor offences.

Q3: If you decided to recommend this child for diversion what option do you want him/her diverted to?

Table 24: Diversion options recommended for all four young people

	Sipho	Vusi	Peter	Zanele	Total	Percentage
Family group conference/ victim offender mediation	6	17	23	12	58	31.5
Community service order	8	1	23	3	35	19.0
Life skills programme/ NICRO YES	2	3	16	10	31	16.8
Counselling or therapy order	7	9	1	13	30	16.3
SAYStOP (or related programme)	-	24	-	-	24	13.0
Compulsory school attendance order	11	-	-	8	19	10.3
Victim reparation/ compensation order	1	2	15	-	18	9.8
Parenting skills/ family time order/ family work	5	7	1	4	17	9.2
Residential Placement (including reform school, school of industry, place of safety, custody, youth care centre)	10	1	-	5	16	8.7
Oral or written apology	1	-	11	3	15	8.2
Good behaviour order	4	2	6	2	14	7.6
Positive peer association/ mentoring order	6	4	1	2	13	7.1
Supervision order	8	-	-	3	11	6.0
Correctional supervision	-	2	8	1	11	6.0

Attendance centre order	2	3	2	-	7	3.8
Conversion to a Children's Court Inquiry	1	-	-	5	6	3.3
Drugs/ alcohol education	-	6	-	-	6	3.3
Programme addressing anger or violence	-	-	-	5	5	2.7
Order prohibiting a child from visiting a specified place (or specified group of people)	1	1	1	1	4	2.2
Suspended/ postponed sentence	1	-	1	-	2	1.1
Institute prosecution	-	1	-	-	1	0.5
Reporting order	1	-	-	-	1	0.5
Wilderness programme	-	-	-	1	1	0.5
Formal caution	-	-	1	-	1	0.5
Total	41	53	48	42		

As discussed in the analysis of the data, two of the dominant discourses that emerge in studying the data are rehabilitation and restorative justice. These ideologies clearly inform the diversion options that are recommended.

Table 25 also demonstrates that there were regional differences in the recommendations made and these will be discussed in Chapter Five.

Table 25: Regional differences in recommending diversion options

Diversion Option	Percentage of responses that recommended this diversion option		Greater number who recommended it in the Western Cape
	Eastern Cape	Western Cape	
SAYStOP	9	17	+8
NICRO YES/ lifeskills	13	20	+7
Community Service	16	22	+6
Compulsory School Attendance Order	11	11	0
Counselling/ therapy	20	14	-6
FGC/ VOM	37	29	-8

Sipho

There was little agreement about the best disposal for Sipho. Almost a quarter of the respondents thought that he should receive some form of residential disposal, but even within those responses there was disagreement about whether it should be a short term or a long term placement or whether it should be through the criminal justice system or the care system. Some respondents expressed faith in the reform school system:

He needs stability so he should be institutionalised. If he was in care then work could be done regarding his relationship with his mother, and he could work on peer pressure and learning skills such as computer literacy. (#32, Probation Officer)

Of those that considered other community-based options as diversions, a compulsory school attendance order was the most popular choice, usually along with other disposals. This order does not yet exist but the respondents were not deterred in recommending this by not knowing what it was or how it would operate. Most respondents went for some form of combination of the available disposals that often left Sipho being faced with quite considerable demands on his time:

I do feel sorry for him. I would impose suspended imprisonment with certain conditions, and I would allow him to stay at home. I would use diversion options as sentences (school, mentoring etc) and maybe do the victim compensation thing. A strict sentence sometimes works well. (#42, Magistrate)

Sipho was the least likely of the four case vignettes to be considered for a family group conference but some respondents would have liked him to undergo one:

Family Group Conference because of his attitude – he had a positive attitude to the previous conference and his circumstances have changed positively since then. (#38, Probation Officer)

As previously stated Sipho was the least likely of the case vignettes to be diverted and some respondents were not even prepared to consider his diversion as a hypothetical:

I will not recommend diversion at all – how many diversions is Sipho going to go through before he comes to his senses!? (#29, Magistrate)

Vusi

The overwhelming consensus from the respondents was that Vusi should receive some form of therapeutic intervention. Twenty-four respondents recommended that he attend a programme specifically designed for adolescents who commit sexual offences; this was the highest number of respondents to recommend any individual intervention for any of the young people. A further nine respondents thought that he should receive some form of more general counselling or therapy. Restorative justice was also popular, with 17 respondents recommending either a Family Group Conference or Victim Offender Mediation either as an alternative or an addition to direct therapeutic interventions.

Within the first category the most popular recommendation for Vusi to be diverted to was SAYStOP which is described in the literature review. Many respondents also

wanted Vusi to undergo a programme addressing his alcohol use alongside the programme addressing his sexual behaviour.

Other recommendations made, such as for attendance centre orders or community service orders were usually expected to run in parallel with a therapeutic intervention; only one respondent recommended an intervention with no therapeutic component, a victim reparation order.

One respondent suggested that Vusi be placed in residential care; the rest wanted him to undergo a therapeutic programme in the community.

One respondent recommended that he be placed on an order prohibiting him from visiting young girls. This order is not available either in existing legislation or the new Bill.

Peter

The two most popular options for diverting Peter to were either community service and/or some form of restorative justice intervention: a Family Group Conference or Victim Offender mediation. A community service order was usually combined with some other form of intervention and the motivation expressed for recommending such a disposal included a desire to ensure that he, and not just his father, was taking responsibility for his offending. Another reason expressed was that his wealth and privileged background would mean that community service would have a particular impact upon Peter:

He must definitely do community service. They should do work if they have caused damage and cannot pay, I would love to use a CSO for this rich child, the rich ones do not understand the consequences of their actions. (#42, Magistrate)

A Family Group Conference was seen as important because it would help rebuild the relationship between the offender and the victim, as Peter was held accountable for his actions. One respondent was so committed to the idea that Peter should undergo a

Family Group Conference that she was prepared to run it herself without a mandate from the court:

Would like to run Family Group Conference, but court would not be interested so we would do it ourselves. Would like to hear from the complainant and would like the individual child to take some form of personal responsibility. Family Group Conferences are not happening at the moment very often, a lot of preparation needs to be done and there are too many constraints on our time. (#36, Probation Officer)

The majority of the respondents recommended that Peter do something to make it right with the victim; even those who did not recommend that they meet each other wanted Peter to apologise in some way. A compensation order was suggested by many respondents, although most did not elaborate on their decision to recommend this, it may have been simply an attempt to formalise what had already been agreed. However, there was also a suggestion that Peter, as well as his father, should pay something:

Considering that he has no income parents will pay but he must take responsibility – maybe move school and use the money saved on boarding fees to pay for the car? Or get a weekend job? He must feel like there is some suffering. (#38, Probation Officer)

The other diversion option that was popular was the recommendation that Peter undertake some form of therapeutic programme; it was thought that there were aspects of his behaviour that he needed to address. Some respondents suggested some other options, usually as part of a combination (or ‘cocktail’ as one respondent put it) of diversion options. Peter’s case was unique among the case vignettes in that no respondent recommended that he either be detained in a residential placement or that his case be converted to the Children’s Court.

Zanele

The most striking aspect of the diversion decisions made regarding Zanele was the amount of respondents who wanted her case to be converted to a Children’s Court Inquiry. Twelve per cent of the respondents suggested such action in answer to this

question but others had mentioned it previously but did not suggest it here, perhaps because they did not consider it to be diversion. The Children's Court was seen to be the most appropriate forum for dealing with problems that originated in the family:

In order not to label the child as criminal I would convert and then ask for diversion there, as they would consider home and family circumstances. They could involve family reunification services, and work on mother's supervision and on parent-child communication. (#38, Probation Officer)

Most respondents wanted Zanele to undergo some form of therapeutic intervention, either counselling or a life skills programme, either in the community or in a residential institution:

Counselling or therapy, maybe a residential order if I could find a residence that I believed in. Some are doing wonderful work but they need more staff and more money. They are working under very difficult circumstances. Zanele needs structure, discipline, loving care and therapy. (#42, Magistrate)

A large number of other disposals were mentioned and these were usually seen as part of a package that would address Zanele's behaviour:

Attend a programme on violence for one month. Compulsory school attendance order for the rest of school time. Written or oral apology. (#57, Prosecutor)

A Family Group Conference or Victim Offender Mediation was considered by over a quarter of the respondents. Some combined it with other programmes, others were happy to let the conference itself make the decision about what further intervention Zanele required.

Q4: Is there an option that you would like to divert this child to that is not available in your area?

As the Bill had not been enacted at the time of the questionnaires being administered many respondents made the point that disposals such as the compulsory school attendance order and the positive peer association order were not yet available. Some

respondents took the opportunity to express their frustrations at their perception that they were overworked and under-resourced:

Everything is available it is just not really done well. We do more new things, FGCs are not really done here. We should do a lot more victim offender mediation, but there is a lot of negativity because of social services. Social Workers are totally overloaded, they cannot do things the way they should be done. (#42, Magistrate)

SAYStOP was frequently mentioned in relation to Vusi. SAYStOP has received a lot of publicity throughout South Africa and practitioners have been trained in delivering the programme but not yet in every area. Many practitioners were aware of it even if they had not personally received the training.

Other options mentioned that they would like to see being made available included restorative justice options, family time orders, alcohol and drug schools and community service orders.

One respondent (#48, Probation Officer) suggested that an anger management programme that was run for adult males in her area should be made available for adolescent girls such as Zanele.

Q5: If this child were diverted away from the criminal justice system, to the option that you suggest, how optimistic would you be that he would not reoffend?

Table 26: Optimism and pessimism about diverting the children

Response	Sipho		Vusi		Peter		Zanele		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
Very optimistic	4	9.3	15	30.6	16	32.7	3	6.5	38	20.3
Optimistic	17	39.5	30	61.2	24	49.0	22	47.8	93	49.7
Unsure	12	27.9	3	6.1	6	12.2	15	32.6	36	19.3
Pessimistic	6	13.9	1	2.0	3	6.1	6	13.0	16	8.6
Very pessimistic	4	9.3	0	0	0	0	0	0	4	2.1
Total	43	100	49	100	49	100	46	100	187	100

Sipho

Table 26 shows that there was a mixed response with regard to the question about Sipho’s future if he was diverted. Unsurprisingly, those who were likely to consider diversion for Sipho were optimistic about its potential impact. Their optimism related to their faith in the programmes and the changes in Sipho’s life, including in his relationship with his mother:

I am quite sure that there will be a positive outcome if his mother is also helping out – the parents are also involved in NICRO lifeskills programmes. (#53, Magistrate)

However, some who said that they would be unlikely to divert Sipho still expressed optimism about the impact of diversion programmes:

He shows remorse and his stability at home is improving. The offences are also decreasing. With good supervision and the maintenance of the orders he stands a good chance of not reoffending. (#8, Probation Officer)

There were some who were pessimistic or very pessimistic about the possible effect of diversion on Sipho. Some of them repeated their concerns about Sipho's personal factors but two made more general points about the futility both of diversion and in one case of working with 'African people' (#46, Prosecutor).

Vusi

All but one of the respondents expressed faith in Vusi's ability to avoid further offending. The respondents expressed greater optimism and less pessimism with regard to Vusi than any of the other young people. The answers were consistent with the previously expressed beliefs in his personal qualities and the effectiveness of the SAYStOP programme:

The SAYStOP programme is good, it is very extensive but it will depend on the individual how much he gets out of it. The programme is very new, there have been few referrals, it is too early to say whether it has been successful but we do not know of any repeat referrals. (#48, Probation Officer)

The one respondent who was pessimistic had been unsure about diverting Vusi and remained concerned about his failure to take full responsibility for his behaviour:

Because he denies the act. This can make him to reoffend because he did not learn from his past mistakes. (#15, Probation Officer)

Peter

A large majority of the respondents were optimistic about Peter's ability to avoid future offending if he was appropriately diverted; 82% said that they were optimistic or very optimistic and only 6% said that they were pessimistic. It was primarily Peter's personal qualities, his background and the support that he was likely to receive that caused the respondents to be optimistic:

He is a bright child with a positive background, he needs to take responsibility for his actions and learn from his mistakes. (#32, Probation Officer)

Some respondents said that their optimism was caused, partly or wholly, by their faith in the diversion programmes or other disposals:

His background, the race thing. He has maybe lived a very sheltered life, when he is confronted with the reality e.g. with a CSO [Community Service Order] he could get a wake-up call. A back-up system would make it easier for him not to reoffend. (#42, Magistrate)

Two of the three respondents who were pessimistic about the effect of diversion had not wanted to divert Peter in the first place; there was concern expressed about the message that would be sent to him by diverting him:

He would not really be punished in any way and we should guard against sending out the message that juveniles are above the law. (#18, Prosecutor)

Zanele

There was a reasonable degree of optimism regarding Zanele's prospects if she was to be diverted but of all the cases there was the largest difference in Zanele's case between those who said that they would divert her and those who were optimistic about the outcome of that course of action. 67% of respondents said that they were likely or very likely to divert Zanele but only 54% of respondents said that they would be optimistic or very optimistic about the effect of diversion.

The optimism expressed was related to Zanele's young age and to the positive effect that the intervention programme was expected to have on her. There was also optimism expressed about the impact of a Family Group Conference particularly when the offence was as minor as this was perceived to be:

My experience of FGCs is that kids usually make up very quickly. It could be a minor incident. Parents are usually happy to make up and get the children together. (#45, Prosecutor)

Those who were pessimistic about the prospects for Zanele were concerned about her lack of remorse and lack of motivation; they were concerned that she would either not attend programmes or that they would have no effect on her:

Her current behaviour is questionable, she is disrespectful, she has a low self-esteem and she does not care about herself. She will fight everyone during an argument. (#8, Probation Officer)

There is a clear correlation between the likelihood of the respondents to divert one of the case vignettes and their optimism regarding the outcome of that diversion. This is best illustrated in that the extremely high feeling of optimism with regard to Vusi is perhaps a reflection of the respondents' faith in the SAYStOP programme.

Q6: *If this child were sentenced to custody how optimistic would you be that he would not reoffend?*

Table 27: Optimism and pessimism about incarcerating Sipho

Response	Sipho		Vusi		Peter		Zanele		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
Very optimistic	0	0	2	3.8	4	7.5	0	0	6	2.9
Optimistic	3	5.7	9	17.0	5	9.4	3	6	20	9.6
Unsure	18	34.0	11	20.8	8	15.1	13	26	50	23.9
Pessimistic	23	43.4	18	34.0	18	34.0	17	34	76	36.4
Very pessimistic	9	17.0	13	24.5	18	34.0	17	34	57	27.3
Total	53	100	53	100	53	100	50	100	209	100

Sipho

Despite the mixed views about whether or not Sipho should be diverted there was almost unanimity regarding the damaging effect that custody would have on him. There

were three main reasons for the pessimism about the effect of custody. Firstly there were those who believed that Sipho was beyond reform and whether he was diverted, sentenced to custody or nothing at all was done that he would still continue to offend.

The second reason given was that there are issues in Sipho's life that need to be addressed and these will not be addressed through a custodial sentence:

Sipho needs a programme to work on his behaviour. Rather than being institutionalised he has to remain in the community. Further more, if he is in custody, he will get the stigma, get labelled and probably learn more criminal activities. (#20, Probation Officer)

The most frequently expressed reason, also contained in the above quotation, was that a custodial sentence actively damaged children. Most respondents believed that custody made the situation worse for children:

He would definitely reoffend, there is nothing in place in prison, he does not have to participate if he does not want to, there are hardened criminals and his behaviour would be affected negatively. (#33, Probation Officer)

Vusi

Although there were the same reservations about custody as expressed with regard to the other case vignettes there was more optimism and less pessimism about Vusi's prospects than about any of the other young people. In addition to the general concerns previously expressed about custody some respondents thought that Vusi would be at particular risk of being a victim of sexual assault. It was not clear whether it was due to the offence that Vusi committed or his age that led to the concerns about his welfare in prison:

His behaviour would definitely be negatively influenced, they would be doing more harm to this good boy. There is a risk of him being a victim of sodomy in prison, so he may also go on to reoffend sexually. (#32, Probation Officer)

The minority who were optimistic about his prospects qualified that optimism by saying that they wanted him to undergo some form of treatment or to be sent to a reform school rather than to custody:

If he was sentenced to reform school then he will be engaged in multi-disciplinary services, attend life skills programme. But if he went to East London prison then I would be pessimistic. (#15, Probation Officer)

Some respondents did believe that the experience of custody might have a salutary, deterrent effect on Vusi.

A view was expressed that it was unrealistic to ask about Vusi's prospects in prison, as he would never be sent there:

Custody was never an option under these circumstances and would not address any underlying problem. (#50, Magistrate)

Peter

The respondents were generally pessimistic about the effect of custody on Peter, with 17% saying that they would be optimistic about its effect on him, and 68% saying that they would be pessimistic. This is the joint highest percentage (with Zanele) of all the case vignettes to express pessimism about the effect of custody.

The same reasons for expressing pessimism about the effect of prison on the other young people were repeated with regard to Peter, and the destructive effects of such a disposal were expressed very strongly:

If he was sent to direct prison I would be 100% pessimistic, there is nothing positive in prison, he would come back as a hardened criminal and steal more cars. The punitive approach will not help in the end. (#39, Probation Officer)

Of those who were optimistic some seemed confused by the words 'optimistic' and 'pessimistic' (something that must be taken into consideration in interpreting the answer

to this question in relation to all the case vignettes) but those who explained their optimism said that it was based on the view that incarceration would have a shock or deterrent value:

He would get a 'heavy' sentence due to the value of the offence. This should be a deterrent away from crime. (#8, Probation Officer)

Zanele

Zanele was considered to be the least likely of all the young people to receive positive benefit from custody; respondents expressed the most pessimism and the least optimism in her case. The small number who were optimistic qualified their optimism by expressing how necessary it would be for Zanele to be appropriately placed and to receive therapeutic intervention:

With the right therapy a Children's Home could be the right place for her. Some thrive there, others go from bad to worse. Under current legislation it would have to go to a Children's Court Inquiry but under the new Bill it could be dealt with by a criminal court. Prosecutor and Probation Officer might suggest converting Zanele to a Children's Court Inquiry, the most likely option is that she would end up in a Children's Home or a place of safety. (#42, Magistrate)

The dominant feeling was pessimism about Zanele's prospects if she went to prison. Her gender was considered to be a factor, there was thought to be less provision for girls than for boys and as a result they were less likely to receive a custodial disposal:

It is very difficult for girls, they need to be assessed for pregnancy before being sent anywhere. She could go to Pollsmoor for a few days then a girls' place of safety, there's one for pre-trial and one for sentenced girls. (#41, Prosecutor)

Not only were more of the respondents pessimistic about Zanele's prospects than with regard to any of the other young people, the possible negative consequences for her were also thought to be potentially more drastic:

The behaviour will get worse, there is a lot of fighting in prison, she might join a gang, like the 28s [a prison gang] and maybe die in prison. (#17, Probation Officer)

The respondents expressed little optimism about the effect of custody on anyone, but were more pessimistic about its effect on Peter and Zanele than on Sipho, perhaps suggesting that they believed that the impact of custody would be particularly severe on girls and children from more affluent backgrounds.

Q7: How likely do you think it would be that representatives of the other two criminal justice agencies would agree with your decisions regarding this child?

Probation Officers

Table 28: Probation Officers’ perceptions of other professionals (%)

Response	Sipho		Vusi		Peter		Zanele		Total	
	Pros	Mag	Pros	Mag	Pros	Mag	Pros	Mag	Pros	Mag
Very likely to agree	42.3	38.5	25.9	25.9	26.9	23.1	24.0	32.0	74	71
Likely to agree	19.2	23.1	48.1	44.4	46.1	42.3	64.0	56.0		
Unsure	3.8	7.7	7.4	14.8	15.4	19.2	4.0	8	9	13
Unlikely to agree	30.8	30.8	14.8	14.8	11.5	11.5	8.0	4	17	16
Very unlikely to agree	3.8	0	3.7	0	0	3.8	0	0		
Total	100	100	100	100	100	100	100	100	100	100

Probation officers in the cases of Vusi, Peter and Zanele were generally quite confident that the legal professionals would agree with their decision. The decision regarding Sipho was an exception, with over a third of the respondents believing that their

recommendation would be unlikely to be endorsed by either the prosecutor or the magistrate. Of the ten respondents who said that prosecutors and magistrates were unlikely to agree with them six had been likely or very likely to divert, two were unsure and two were unlikely. However, even some of those who had originally been unlikely to divert imagined themselves arguing in favour of diversion in discussion with the legal professionals. Respondents #48 and #49 (Probation Officers, interviewed together) had initially said that they were unsure and unlikely to divert but suggested that the Magistrate and Prosecutor were unlikely to agree with diversion, rather than being unlikely to agree with them:

The magistrate will not be in favour of diversion, he will think that he has had lots of opportunities. The prosecutor will have to agree with the magistrate and go for a tougher response. (#48, Probation Officer)

Other respondents who had wanted to recommend diversion were pessimistic about the attitude of the criminal justice professionals while some probation officers felt that they could recommend diversion and persuade the legal professionals to take a similar view:

They are likely to agree as long as we provide an intensive and comprehensive report. We need to put everything in the report but our problem is that we sometimes don't do that. The problem is that we have high caseloads – not enough time, not enough staff. (#37, Probation Officer)

Although probation officers were overwhelmingly in favour of diverting Vusi there was some doubt amongst them about their ability to convince the legal professionals of this course of action. There was a feeling that prosecutors and magistrates would only be interested in the details of the charge and so would not consider diversion:

This is a very serious offence, prosecutors in my area do not want to hear about diversion when it comes to such offences. The magistrate may or may not agree with my decision because he/ she may be influenced by the prosecutor's decision. (#1, Probation Officer)

Some probation officers were, however, more confident that prosecutors and magistrates could be persuaded as to the benefits of diversion:

The magistrate and prosecutor are likely to agree if they are informed about what programmes will be run with Vusi, and why. In most cases they agree when a child is young, and then follow up vigilantly. (#32, Probation Officer)

Probation officers who did not want to divert Sipho or Vusi were confident that prosecutors and magistrates would endorse their decision.

Although the majority of probation officers considered that the legal professionals were likely to agree with them there was some uncertainty expressed about how they might react to Peter; those respondents who were opposed to diverting Peter thought that the legal professionals would agree, those who wanted to divert him expressed doubts;

The prosecutor and magistrate are more likely to be most concerned about the value of the car. The magistrate will ask who will be punished? The child or the father? (#35, Probation Officer)

The issue of the regional disparities in the responses of prosecutors and magistrates was raised again:

Prosecutors and magistrates vary a lot, some understand diversion, some don't. [Two areas of Cape Town] court will not divert. (#37, Probation Officer)

Probation officers had faith in their ability to convince the criminal justice professionals of the benefits of diversion for Zanele particularly if they were able to submit a good report with imaginative proposals for diversion but some probation officers were concerned that the criminal justice professionals might count Zanele's previous caution against her:

In this case you need to convince the magistrate first. For this reason Zanele is not a first offender so usually prosecutors are very reluctant to agree with diversion to reoffenders. (#24, Probation Officer)

Prosecutors

Table 29: Prosecutors’ perceptions of other professionals (%)

Response	Sipho		Vusi		Peter		Zanele		Total	
	PO	Mag	PO	Mag	PO	Mag	PO	Mag	PO	Mag
Very likely to agree	44.4	33.3	20.0	20	47.1	47.1	3.3	33.3	87	84
Likely to agree	44.4	50	73.3	46.7	41.2	47.1	46.7	60		
Unsure	5.6	11.1	6.7	26.7	11.8	0	6.7	6.7	8	11
Unlikely to agree	5.6	0	0	6.7	0	5.9	13.3	0	5	3
Very unlikely to agree	0	0	0	0	0	0	0	0		
Not Specified	0	5.6	0	0	0	0	0	0	0	2
Total	100	100	100	100	100	100	100	100	100	100

All but one of the prosecutors, were of the opinion that the decision that they made about Sipho would be agreed by both the magistrate and the probation officer. This is based on their knowledge of the procedures and experience of similar cases:

In our offices youths are sent for diversion once only. (#30, Prosecutor)

Somewhat surprisingly, one respondent suggested that sometimes prosecutors might be arguing in favour of diversion against probation officers who want to prosecute:

We are all interested in the child’s well being and will usually agree on a decision to divert. Occasionally probation have to follow their rules and do not want to divert but we will anyway. (#41, Prosecutor)

Both the prosecutors who wanted to divert Vusi and those who did not felt that probation officers and magistrates would endorse their decision. The one prosecutor who thought that the magistrate was unlikely to agree with her was concerned that a magistrate would be more punitive than she was:

The view of the probation officer will depend on their assessment. Many magistrates are not aware of SAYStOP and just think 'jail, jail, jail'. (#45, Prosecutor)

Prosecutors who wanted to divert Peter were generally confident that magistrates and probation officers would agree with them:

They also believe that first offenders should be kept out of court and prevented from being convicted and get a record. (#57, Prosecutor)

Prosecutors thought that the other professionals would agree with them about Zanele, with two exceptions, both prosecutors who predicted that a probation officer would be less inclined to favour diversion than they were. Prosecutors who were opposed to diversion felt that probation officers and magistrates would feel the same way but some who favoured diversion also felt the other professionals would agree:

No one would want her in custody, there are not a lot of residential places for 14 year old girls in Cape Town. (#46, Prosecutor)

Magistrates

Table 30: Magistrates’ perceptions of other professionals (%)

Response	Sipho		Vusi		Peter		Zanele		Total	
	PO	Pros	PO	Pros	PO	Pros	PO	Pros	PO	Pros
Very likely to agree	37.5	50	50	50	50	37.5	57.1	42.9	94	91
Likely to agree	50	37.5	50	50	37.5	50	42.9	42.9		
Unsure	12.5	12.5	0	0	12.5	12.5	0	0	6	6
Unlikely to agree	0	0	0	0	0	0	0	14.3	0	3
Very unlikely to agree	0	0	0	0	0	0	0	0		
Total	100	100	100	100	100	100	100	100	100	100

No magistrate said that the other criminal justice professionals were likely or very likely to disagree with him or her with regard to Sipho. One magistrate who was unlikely to divert thought the issues were so clear cut that there could be no different interpretation:

The factors relating to the decision are not variable thus the appropriate measure of punishment should not differ. (#56, Magistrate)

Another magistrate believed that there was consensus within his own court but acknowledged that a different decision might be made in a different court. He seemed to think that geographical differences were more significant than professional ones:

We all have the same feelings in this court but a different probation officer or prosecutor might think differently. (#42, Magistrate)

One magistrate, who said that he was likely to consider diversion, expressed regret that he could not be sure of the support of the prosecutor:

This is due to our different experiences and knowledge of the diversion benefits. We are unfortunately trapped in our old tradition of dealing with the offender the same way. (#31, Magistrate)

The Magistrates equally all thought that the other professionals were likely or very likely to agree with them about Vusi. Magistrates who were likely to divert Peter thought that the other professionals would agree:

When they consider the whole circumstances of Peter I believe that each would agree the importance of diversion in this case. (#31, Magistrate)

However, Magistrates who were unlikely to divert also believed that probation officers and prosecutors would think the same way:

According to the given facts he committed a serious offence, theft of a locked motor vehicle. He carefully planned the offence, he is too young to have a valid driving licence, reckless and/ or negligent driving is also involved. (#6, Magistrate)

The magistrates felt that the other professionals would be likely to agree with them, and tended not to expand upon their answers. One magistrate felt that the probation officer was very likely to agree with his decision to divert but was less confident about obtaining the agreement of the prosecutor:

The unrepentence of her might cause bias to the other agents. (#31, Magistrate)

In summary, prosecutors and magistrates are more confident of being in agreement with probation officers than probation officers are about prosecutors and magistrates. Prosecutors were generally very confident that magistrates would agree with them, except in the case of Vusi where they were more doubtful. In general, magistrates were confident that both probation officers and prosecutors would agree with them.

The relationships between the three professions and how that will affect diversion decisions are discussed in the data analysis chapter.

Q8: Would your decision about whether or not to recommend this child for diversion be affected by what you thought another agency might recommend?

Table 31: The effect on practitioners of their perceptions of other professionals' attitudes to Sipho

Response	Number	Percentage
Yes	15	30.6
No	34	69.4
Total	49	100

This question was answered in detail with regard to Sipho: respondents tended to refer to their earlier answers when discussing the other vignettes. Table 31 refers to the responses regarding Sipho.

Most of those who said that their view would be affected considered it to be a virtue that they were consulting with their colleagues from other professions:

Yes, if the probation officer or magistrate does not agree with my recommendation, I will listen to those suggestions, observations and opinions and from there have an informed decision. (#60, Prosecutor)

However, some probation officers felt that they might feel threatened or upset by having their recommendation over-ruled and be tempted to suggest what would be accepted rather than what they believed to be right:

At outside (rural) courts we know which magistrates are lenient and which are strict, we are sometimes tempted not to upset the magistrate. (#35, Probation Officer)

It affects me sometimes if they do not take my recommendation. I am the one who knows the case the best, they should trust the information that I am giving them. (#37, Probation Officer)

Those who answered ‘no’ considered it to be a positive sign that they would value their professional judgment above any other factors:

No, my decision to recommend for diversion would be based on the facts after pre-trial assessment, I have to decide on any form of diversion programme and thereafter convince another agency of the facts. (#4, Probation Officer)

For many respondents this seemed like an irrelevant question, as they believed that the representatives from other agencies would agree with them anyway, either from their own deliberations or through consultation:

No, not at all. We work closely together and probation and prosecutor always discuss every case so as to reach the most realistic solution. (#28, Prosecutor)

Some prosecutors, both in answering this question and others, said that they were particularly keen to hear the probation officer’s assessment in Vusi’s case or Peter’s case:

Yes, the probation officer because they will consult with the parents and the accused and will take the social as well as the legal circumstances into account and make an informed proposal. (#57, Prosecutor)

Q9: Please add any further details that you feel are relevant about this child and the diversion decision that you would make.

Sipho

Some respondents took the opportunity to emphasise points that they had previously made, or to express regret that there had not been earlier intervention in Sipho’s life. Two respondents suggested that although they wanted Sipho to be prosecuted through the criminal court they hoped that he would receive some form of therapeutic intervention at the end of that process:

Diversion as part of sentence. The NICRO worker and probation officer could play a vital role in the suspension period. (#8, Probation Officer)

One suggested, in answer to a specific follow-up question, that there would be additional benefit in prosecuting Sipho before he underwent a therapeutic programme:

Proceeding gives the child a criminal record, that would act as a deterrent. (#45, Prosecutor)

Vusi

Some of the respondents made general points about teenagers, sexual offending or about the dynamics within that family. One respondent stated the importance of ensuring that the needs of the victim were met along with Vusi's needs.

Other respondents expanded on their views regarding the use of diversion for serious sexual matters:

It is not true that it would not be possible to divert rape, even if it was a rape case then I think I would consider diversion. The circumstances surrounding the rape might make a difference, such as if there was violence or the use of a knife. Rape is often a teenage thing, I would divert if I thought it was an experimental case. I'm generally not convinced about diverting serious cases. (#42, Magistrate)

Peter

Some respondents repeated and emphasised points that they had made earlier in the questionnaire, particularly relating to the need for Peter to undergo an appropriate programme. In the Western Cape the issue of Peter's race had been mentioned and the respondents who were interviewed in person were asked to comment on whether his race would be a factor in the decision to divert. No respondents admitted that they would be influenced by Peter's race but some thought that it would be an influence on others:

It is difficult for us to say whether the fact that he is white would make him more likely to be diverted – Mitchell's Plain is mainly coloured, only 10% black, and very few white people so we have little experience of race as a factor. But it most likely is a factor, it happens at other courts where there are more white people. (#48, Probation Officer)

Magistrates were identified as being particularly likely to be influenced by the race of a defendant:

White magistrates are likely to agree with the probation officer's recommendation; racism plays a part. White magistrates see black kids as criminals all the time but see a white kid as having made a mistake. There is a lot of cultural misunderstanding, for example, in the white community eye contact is respectful but black kids look down, eye contact is seen as disrespectful. (#38, Probation Officer)

Zanele

Respondents took the opportunity to expand on their preliminary analysis of Zanele, the causes of her behaviour and the appropriate response:

Zanele is rebelling against something, need to attend to her not knowing her father, family issues never attended to. Does mother cope? Fighting with friend, very insecure about boyfriend as a result of father relationship. (#17, Probation Officer)

Additional Comments

The respondents were invited to make additional comments as they wished relating to the case vignettes or to the Bill in general. Some added nothing extra, others made a brief point, others replied in great detail, even adding extra paper. The general comments can best be presented in three categories.

Concerns about implementation

Respondents were enthusiastic about the introduction of the Bill but were lacking in confidence that it would be adequately resourced:

The biggest problem is the implementation – the Bill could be wonderful but I am disillusioned by the system. If a very simple system is not working then I am sceptical about the new regime. It could be a pleasure if adequately resourced. (#42, Magistrate)

Some respondents referred to their own need for training, one suggesting that the entire career of a criminal justice professional could be spent in training, as the pace of change was so rapid:

We need continuous training. I have been here since 1991, then there were reform schools, schools of industry, whipping, what we are presently doing is a new way of working – can we implement the new Bill? We need direct continuous training, we understand things better each time that we hear them. (#17, Probation Officer)

There was also a suggestion that the Bill would make little difference to the true causes of crime: poverty, living conditions and the values of a community:

The main problem in [the township] is that children are committing very serious offences. The informal settlement has a lot to do with it, there is no respect there compared to the rural Eastern Cape where children are dealt with by the whole community. In the informal settlement people like to live together, to cohabit and that results in children seeing things that they shouldn't see. You cannot discipline a child when you live in that sort of arrangement. You can never raise a responsible child in a shack. (#53, Magistrate)

Role of professional groups

Some respondents were directly critical of other role players within the criminal justice system, suggesting that they would be to blame if the Bill was not properly implemented. Probation Officers were critical of the Department of Justice and of the attitude of police, prosecutors and magistrates:

The Bill must come in very soon. A lot of children make so many mistakes, they can see courts view them as criminals first, not children, police don't care if they are male or female – maybe new Bill will be more open. We should get more training before it is implemented. Magistrates and prosecutors think probation officers and social workers are soft, lenient, they discredit us as practitioners. We are ready for new system but they are not – they just see offence and previous record, they even send children to prison for theft. (#35, Probation Officer)

Prosecutors also expressed concern both about their own profession and the role of schools and social workers:

The Bill is wonderful but the systems need to be in place. It is very important that children return to school but the schools often will not take them. Social Workers are underpaid, overworked and not motivated. (#41, Prosecutor)

The problems caused by the regular turnover of prosecution staff was a recurrent theme:

You would think that someone who is called a specialist would receive more money, but that is not the case at all – they just get the same. We are understaffed and there is a high turnover so an available prosecutor just has to deal with whatever is next on the list – murder, rape, whatever. (#13, Prosecutor)

The Children's Court

In addition to those who had mentioned it previously one more respondent referred to the possibility of converting the case to a children's court and dealing with each child that way:

The youthful age and circumstances in most, if not all, of the cases would preclude dealing with the 'offenders' through the criminal justice system and 'diversion' would probably be effected long before the offenders were charged (if some of them would ever be charged). Courts can and probably will convert at least some of the cases into Children's Courts Inquiries before evidence is led. (#50, Magistrate)

One Children's Courts Magistrate was interviewed. She said that she was a strong supporter of the Child Justice Bill and spoke in some detail about the Children's Court system. She had little faith in the options that were available to her, saying that Children's Homes had great difficulty in controlling the behaviour of children,

especially older children and girls. She said that there were whole sections of the population that were not catered for by the current system such as Xhosa-speaking children.

She also said that many of the cases that were converted to Children's Court Inquiries did not end up being finalised, they either got lost in the bureaucratic system due to inordinate delays or the children were released from secure care and failed to attend court.

The Magistrate commented on the two case vignettes, Sipho and Zanele, who had been recommended for conversion by some respondents. She said that Sipho would not be a suitable case for diversion because none of the limited options that were available to her would be suitable for him; he had committed more offences than most children who were converted:

*At this stage in his life he should perhaps be punished rather than reformed.
Sipho can no longer be considered just a victim of his environment.*

She thought that Zanele might be a more suitable case for conversion, as her offence was not that serious and she had less of a record. She felt that either Zanele could be briefly taken out of her home environment or could be threatened with that possibility and that might shock her into improving her behaviour:

A short time away from home is often enough punishment, and she could then go back to her mother's care if her mother was prepared to take her.

The main concern about this course of action would be that a conversion to the Children's Court would not allow a means for the victim to be compensated.

Speaking generally, the Magistrate said that the current child justice system was inadequate, leading to many children being inappropriately referred to the Children's Court:

Many cases (maybe 10 – 20%) that are referred to me do not belong with me, they should have been punished. Although the Criminal Court Magistrate here is very good, some children should have been sent to me a long time before. Children should be more aware of what their rights are.

We do not deal very well with children whose main problem is offending but it often balances itself out. We send them to inadequate placements such as children's homes, they run away because the homes are not secure enough, they reoffend and end up back in the criminal court anyway.

Child Justice Reformers

The process of writing the Child Justice Bill and the campaign to have it implemented have been driven by a small group of committed reformers within South Africa. The individuals within this group have a high profile both within the field of child justice and beyond it. Three of these reformers were interviewed, and the questionnaire was administered electronically to the other two reformers. The purpose of collecting data from this group of people was to get a sense of how the Bill should be working, if those who knew it best and supported it most strongly could have their intentions realised.

Section One - Profile

The five reformers from whom data was elicited are all in senior positions in government, universities or non-governmental organisations. They are all either active members of the Child Justice Alliance, or have been involved in drafting the Bill. Included in the group were those involved in devising the Bill, advocating for its enactment and some of those responsible for its eventual implementation.

Table 32: Profile of reformers

	Geographical Base	Race & Nationality	Gender	Experience
63	Western Cape	White South African	Female	6 years
64	Gauteng	White South African	Female	3 years
65	Western Cape	White South African	Female	2 years
66	Cape Town	White South African	Male	10 years
67	Western Cape	White South African	Female	11 years

All five reformers are high profile activists in the field of child justice. This group has been extremely influential in the development of the Bill and the respondents have a high level of knowledge about its workings, almost to saturation point:

I am over well prepared for the introduction of the Bill. (#67)

These five individuals have contributed to drafting the Bill, assisted government in preparing for its implementation, co-ordinated the civil society response, written books and articles and set up diversion projects. Although all the members of this group were in paid employment related to their work on the Bill, their commitment to it clearly goes beyond the mere demands of their work. They gave examples of studying, writing and involvement with civic society that demonstrated a strong commitment to the Bill.

Section Two – The Child Justice Bill

How prepared would you say that you are for the introduction of the Bill?
What has been your involvement in the drafting of the Bill and/ or the campaign to have it implemented?

Table 33: Reformers’ preparedness for the introduction of the Bill

Response	Number
Very well prepared	2
Prepared	2
Partially prepared	1
Total	5

All the respondents said that they felt ready for the implementation of the Bill. The one who said that he was only partially prepared indicated that he was referring to his organisation where a lot of work remained to be done. Examples that they gave of their own involvement in the Bill’s drafting and implementation campaign included teaching, research, writing articles and participating in committees.

One of the principles that the Child Justice Bill is based on is that some young offenders should be diverted away from the criminal justice system. Do you agree with this principle?

All five reformers said that they strongly agreed with this principle:

The benefits of diversion are obvious, and the disadvantages of prosecution are also obvious, the child will end up with a meaningless sentence. Why put an additional load on a system that is already overloaded – there are more meaningful interventions towards children than the criminal justice system provides. And it works. (#66)

The Child Justice Bill provides a number of diversion options; some of these are listed below. Please indicate which of these are available to young people where you work.

Most of the reformers answered the question in relation to what was available nationally.

There was a difference in interpretation in the answers to this question; some respondents replied in relation to whether a diversion option was available at all, others solely answered with reference to an option being used as a diversion. Respondents made the general point that the thinking behind the Bill was not that magisterial areas should wait for diversion programmes to be centrally funded and introduced; most of the programmes could be implemented using existing resources if practitioners were prepared to act imaginatively.

Case Vignettes

Q1: Attitude to diversion

Table 34: Reformers’ attitudes regarding diverting each child

Response	Sipho	Vusi	Peter	Zanele
Very appropriate	1	1	1	1
Appropriate	3	2	4	3
Unsure	1	2	0	1
Inappropriate	0	0	0	0
Very Inappropriate	0	0	0	0
Total	5	5	5	5

The one respondent who was unsure about diverting Sipho was pessimistic about the prospects of prosecution but wanted more information about the previous interventions.

The other respondents felt that he was an appropriate candidate for diversion. One respondent said that he was exactly the sort of young person that the new legislation was designed to help; he would not be diverted under existing legislation because of his previous convictions and lack of a fixed address but under the new legislation it would be impossible to imprison him so diversion would be the sensible option:

What is needed is either an alternative sentence or a diversion, so what would it matter? He might as well be diverted. Alternative sentences and diversion are just two sides of the same coin. (#67)

The two respondents who were unsure about Vusi were inclined to divert but were keen that he be further assessed. They were interested in discovering the degree of violence that was used and the impact of the offence on the victim. Those who were keen to divert Vusi also wanted more information, both about him and the victim, but thought that on the basis of the information given that he would be a suitable candidate for diversion.

All respondents thought that it would be appropriate to divert Peter, particularly due to the consequences that gaining a criminal record would have for him and because of his clear previous record. Zanele was also considered to be an appropriate candidate for diversion by most respondents due to her personal circumstances and the relatively minor nature of the offence:

She is a good candidate for diversion, she is a child full of troubles. (#66)

One respondent was concerned about her stated lack of remorse and said that she would have liked to have scheduled a counselling session for Zanele before recommending diversion to see if she could change her attitude.

Q2: Most influential factor.

Table 35: Factors influencing the reformers’ decision regarding diverting each child

Response	Sipho	Vusi	Peter	Zanele
Previous Record	3	2	3	0
Current Offence	0	2	2	0
Personal circumstances	1	3	2	2
Attitude	0	0	0	3
Other	1	0	1	1
Total	5	5	5	5

Two of the respondents who referred to Sipho’s previous record said that they were diverting him despite his previous offending; it was the only factor that made an otherwise simple decision complicated. The respondent who said that she considered something other than those listed actually discussed all factors and thought that the fact that Sipho had not been sentenced under the new regime meant that he should be given a chance. Although only one respondent said that Sipho’s personal circumstances had the greatest influence on him, all respondents referred to those circumstances at some point.

The fact that Vusi’s offence was a first offence was considered to be very important by two of the respondents, as there was no evidence of a pattern of sexual aggression. His personal circumstances were seen to be positive: both the fact of his stable lifestyle and that the offence was within the family. One respondent also considered the details of the offence to be mitigating:

Current offence: wasn’t a deliberate sexual assault, he had been drinking, his parents were away. (#65)

The combination of Peter's positive personal circumstances, his clean previous record and the possible impact that a criminal record would have on him persuaded all the respondents that diversion would be appropriate:

The respondents were struck by Zanele's defiant attitude but interpreted it in different ways; one respondent was concerned by her lack of remorse, another was impressed by her honesty. It was felt that her behaviour was fairly typical and that the problems that she was experiencing at home and at school would be amenable to diversion intervention.

Q3: Diversion Options.

All respondents recommended some form of long-term therapeutic programme, in the community for Sipho. They were agreed that a further lifeskills programme would not be sufficient on its own but there were a variety of options suggested. These included the Journey programme, family work, mentoring and a Family Group Conference.

All five respondents said that Vusi should be diverted to a specialist programme for children who commit sexual offences, and four of them mentioned SAYStOP by name:

Some form of therapeutic programme, SAYStOP if it is available but it may not be. He needs counselling, blaming it on his drinking is not convincing, he could be a serial rapist with repressed feelings. I would consider family work, therapy and counselling and work with his sister. (#66)

Four of the five respondents wanted some form of Family Group Conference to be organised as part of Peter's diversion. They felt that this conference should then recommend a further disposal but that should involve possibly some form of programme to address Peter's behaviour, monetary compensation to the victim and a stipulation that Peter himself should be sanctioned, the reparation should not solely be left to his father:

The outcome of such a conference cannot be dictated, but a likely outcome would be that Peter's parents pay the victim what is owing and then Peter has to pay his father back in some way – perhaps forfeiting pocket money and doing chores at home over a period of time, perhaps foregoing birthday or Christmas gifts. Some community service would also be good – perhaps some work for the victim's family or for a charity of the victim's choice. (#64)

All respondents wanted to involve the victim in Zanele's diversion intervention, either through a Family Group Conference, Victim Offender Mediation or by Zanele undergoing victim empathy training followed by making an apology. It was felt that other programmes could also be of benefit to Zanele and that she should undertake a number of these.

Q4: Options that are not available everywhere.

Two of the respondents suggested that programmes were more likely to be available in urban areas than rural areas. Three of the five respondents referred specifically to SAYStOP, saying that it was not available everywhere and one was concerned that victim-offender mediation was not generally available. One respondent emphasised that sentencers should not feel restricted by options that are not available:

This is not really the issue, some things are available in all areas, some things are not. The whole point of the Bill is that the preliminary inquiry will make a creative plan in light of what is available in the area. (#67)

Q5: Optimism and pessimism about the effect of diversion.

Table 36: Reformers’ optimism and pessimism about the diverting each child

Response	Sipho	Vusi	Peter	Zanele
Very optimistic	0	1	1	0
Optimistic	2	3	3	3
Unsure	3	1	1	2
Pessimistic	0	0	0	0
Very pessimistic	0	0	0	0
Total	5	5	5	5

Those who were unsure about Sipho recognised that his future depended on a number of variables, not all of which were within the control of criminal justice professionals. The optimism expressed by the other two respondents was tentative and conditional on the right intervention and support being provided. Respondent #66 said that he was optimistic but only 5.5 on a scale of 1 – 10. The one respondent who was unsure about Vusi said that she had not read research regarding such cases. The other respondents felt that if Vusi was appropriately assessed and diverted to the right programme then he would not reoffend:

I am assuming that if the decision to divert him was taken it would be as a result of a thorough assessment. Given his past case history and provided the quality of the intervention was high, there is a good chance that he would not reoffend.
(#64)

Most of the respondents considered Peter’s behaviour to be an adolescent ‘spree’ that had gone wrong and that with the right intervention it was unlikely to happen again. The one respondent who was unsure was concerned that someone who would reoffend when their personal circumstances were so positive might have something inherent in them leading to offending behaviour. Some respondents were optimistic that, with the

right intervention, Zanele could avoid further offending. Those who were unsure were concerned about her stated lack of remorse and the consequences for her if she did not return to school.

Q6: Optimism and pessimism about the effect of custody.

Table 37: Reformers’ optimism and pessimism about the incarcerating each child

Response	Sipho	Vusi	Peter	Zanele
Very optimistic	0	0	0	0
Optimistic	0	0	0	0
Unsure	0	1	2	0
Pessimistic	1	4	3	4
Very pessimistic	4	0	0	1
Total	5	5	5	5

The respondents were unequivocal in their belief that custody, either prison or reform school, could only do harm to children:

Exposure to the brutalising effects of imprisonment, including exposure to other young people who have been involved in crime – possibly serious, violent crime, could only have a detrimental effect. (#64)

Even the one respondent who said that she would be unsure about Vusi was quite pessimistic:

It is such an atypical case, but the conventional wisdom is that he would be recruited into a gang in about 3 minutes. (#67)

The other respondents were pessimistic; both for the general reasons that they expressed with regard to other children going to custody and because they were concerned that the particular programme that Vusi would need to undergo would not be available there.

Some respondents suggested that Peter would have particular problems in custody:

I am pessimistic about everyone who goes to prison but he would have severe problems, he would probably become embittered. White prisoners have three choices – become religious, head a drugs cartel, or keep quietly to themselves. (#67)

Those who were unsure about Peter’s prospects in custody considered that his positive personal qualities and strong family support might be enough to overcome even the damaging impact of incarceration. All considered that a custodial sentence, of any form, would make Zanele’s situation worse. It was felt that she would assault someone in prison and learn more fighting skills.

Q7: Views about criminal justice agencies.

Table 38: Reformers’ perceptions of practitioners’ decisions regarding the diversion of the children

Response to diversion proposals	Probation Officers	Prosecutors	Magistrates
Very likely to agree	5	1	1
Likely to agree	14	7	7
Unsure	1	8	10
Unlikely to agree	0	4	2
Very unlikely to agree	0	0	0
Total	20	20	20

The reformers were more confident about the probation officers recommending diversion than any of the other professionals. However within the group there was an acknowledgement that the responses of any of the professionals could be variable and unpredictable:

The attitude of prosecutors towards diversion differs greatly from one magisterial district to another. (#63)

There are different approaches taken by different magistrates in different areas. (#65)

The views of probation officers are totally variable. (#67)

With regard to Vusi they felt that particularly if the offence was one of rape it would be likely to be dealt with harshly by the legal professionals:

Due to the profile that child rape enjoys you can expect the child justice system to be very harsh. He is 14 so he could go to prison. Maybe it would be appropriate for him to receive a sentence and then the programme. (#66)

There was, however, also acknowledgement that legal professionals had also expressed concern about how child sex offenders were currently being dealt with by the criminal justice system.

The respondents were confident that probation officers would agree to divert Peter, but some were more concerned about prosecutors and magistrates. His colour was given as a reason why he might be diverted. Some respondents were concerned that the value of the car that was stolen might deter legal professionals from diverting him.

Again, the respondents were confident that probation officers would recommend that Zanele be diverted. They were less clear about what they thought that legal professionals should do but some thought that the fact that she was female could work in favour with one or both of the legal professionals.

Q9: Further details

One respondent emphasised that it would be unusual to divert a child with six previous convictions and it would only be the 'newness' of the Bill that would persuade her to do so in Siphos's case.

The respondents added some more detail about their views that there may be some legal or factual problems relating to the information that had not been provided in Vusi's case

vignette. Issues of the use of violence, full disclosure of the offence and the legal position regarding diverting for rape cases were mentioned.

The respondents commented on whether Peter's race would be a factor in the decision to divert him. All thought that it would be a factor, but as part of a list of issues that would be considered:

It is definitely true that he is more likely to be diverted because he is white. It is more complex than just race though, other factors include class, personal behaviour, the fact that his father can pay and the sense that he is not a criminal in the making. It is not just white magistrates who think in that way. (#67)

One respondent had been concerned about Zanele's lack of remorse and commented further on this:

Zanele's case is interesting in that it raises the question as to whether children have to show remorse to be considered for diversion. I don't think that they have to, but leading them to a stage where they can show remorse would need to be a goal of the diversion. (#64)

The respondents made some detailed and wide-ranging comments about the content of the Bill and the prospects for its successful implementation. These will be considered in the next section, which analyses the data thematically.

DATA ANALYSIS

The data is analysed in ten themes that follow the themes of the literature review. The first part of the review considers the context of the Child Justice Bill; the first two themes examine the attitude of the respondents to the process of legal reform and then to one specific part of it: the use of children's court conversion. The third and fourth themes link to the understanding of the use of discretion, particularly the attitude of different professional groups, and the potential for discrimination. The next part of the analysis examines the major influences on the Bill: children's rights, diversion, rehabilitation, restorative justice, and the needs of child sex offenders. Each of these themes is analysed in turn, with the use of diversion being evaluated from the perspective of whether a bifurcated system is likely to be created. In the final chapter of the thesis, the conclusion, connections are drawn between the literature reviewed and the responses of the research participants.

Context: Legal Reform

The practitioners demonstrated a knowledge of and commitment to legal reform in their responses. The majority of respondents stated that they had been at least partially prepared for the introduction of the Bill and, of those that were unprepared or very unprepared, all had at least some awareness that there was forthcoming child justice reform.

The campaign to have the Bill implemented incorporated both training in the Bill and advocacy for its introduction. The combination of this advocacy with what was clearly an existing dissatisfaction with the current child justice system meant that practitioners were both committed to the new legislation and committed to the idea that legal reform was the way to effect change. However, many respondents had been implementing the training prior to the Bill being introduced, demonstrating that a new child justice regime was not entirely dependent on new legislation being introduced. It was possible to increase the use of diversion schemes and restorative justice under existing legislation:

We are doing diversion now, for some first offenders and young children. It depends on the crime and the circumstances of the child. We divert to NICRO and to SAYStOP, for sexual assault and occasionally for rape. (#46, Prosecutor)

In general those who associated the Bill with receiving some additional training and new ideas for working with child offenders tended to be quite positive while those who were expecting extra money, continuous training or substantial improvements in infrastructure were disappointed:

But at [this court] they are not very well prepared, no infrastructure and nothing here in terms of training. Some have attended training but not everyone went and the feedback was not as intense. No training in the last six months and no refresher courses. The Magistrate can make an order but not sure how it is implemented. (#6, Magistrate)

Some respondents also linked their support for the principle of diverting more children with the need to change the law or improve the infrastructure in order to bring this about. There was a hope that a change in legislation would be matched by an input of resources to support the new regime:

I have strong feelings about this, there is nothing the matter with the principle we just lack the means to do it properly, the structures are not in place. I strongly doubt that they will be in place when it is passed. If they are not in place when it is passed it will be a big farce.

The current structures, such as so-called juvenile school and the drug school are not effective enough; there is not enough money or manpower. Social workers do not have enough time to deal effectively with children. (#42, Magistrate)

Some practitioners were concerned about the implementation of the Bill, about whether it would be adequately resourced and whether their profession and other professionals would receive the necessary training.

The theme of campaigning for legal reform is also evident in the practitioners' and the reformers' responses to the case vignettes.

There was great reluctance amongst the practitioners to divert Sipho and some respondents linked that to the current legal regime, where they perceived that the

legislation did not allow more than one diversion and the legal professionals were reluctant to consider diversion:

Both the prosecutor and magistrate in my area are very conservative, they do not use the Child Justice Bill. Hoping as soon as it is implemented they will change their act. (#15, Probation Officer)

Another respondent agreed that a change in legislation would allow Sipho to be diverted, but did not consider this to be a positive development:

My experience is that children are clever, streetwise, and will abuse the system if they get diverted every time. I'm not convinced that diversion is appropriate for repeat offenders. I love the Bill on paper but the reality is that it is not working. (#42, Magistrate)

The issue of legal reform is a very relevant one with regard to Vusi, as there are greater barriers to his diversion than to that of any of the other young people; he is charged with an extremely serious offence, and does not appear to have made a full admission. There was less discussion amongst the practitioners of the need for legal change or the consequences of new legislation with regard to Vusi, possibly because it was unclear at the time that the fieldwork was carried out what the new legislation would say about diverting sex offenders. One respondent who favoured diversion stated that if diversion were not possible then his preference would be for Vusi to undergo the SAYStOP programme as an alternative to a custodial sentence. It was clearly his hope that new legislation could facilitate this:

The SAYStOP can also be used as part of a sentence. If no empowerment is received then the chances are less. (#8, Probation Officer)

The discussion among the practitioners regarding how legal changes would affect the decision about Peter's diversion focussed on the situation with relation to whether it would be possible for someone who had stolen a car of the value that Peter took would be eligible for diversion. At the time of writing it is not yet clear what the Bill will say about this issue. There was no substantial discussion about how the legal changes might affect the prospects for diverting Zanele but one respondent (#50, Magistrate) said that

he could not imagine a criminal justice system where children such as Zanele would not be diverted. The other responses to her situation demonstrate that his views were perhaps not shared as universally as he perceived.

As the group of reformers had been so closely involved with the campaign for the implementation of the Bill it may reasonably be expected that its members would support the idea that the way to effect change is through changes in the law.

Their commitment to legal reform meant that some of the respondents were actively involved in campaigning for the Bill at the time that they were interviewed and they took the opportunity to update the information. For example, it was pointed out that the phrase 'other restorative justice processes' was taken out by the state law advisor who also ruled that it would be unconstitutional to prohibit a child from visiting a specified place. It was striking that none of the practitioners who responded knew anything more about diversion options other than those on the list. It appeared that no practitioners had received any training since the Bill had been redrafted.

The reformers were inclined to discuss the Bill in general terms, in particular their expectations for the new regime. The most interesting response in this regard was the suggestion from respondent #67 that the purpose of the Bill was to encourage magistrates to use diversion and to think imaginatively about how to deal with children who appeared before them. She said that many of the options listed in the Bill could be used prior to the enactment of the Bill. This response reflects the context that many of the Bill's advocates work within: they are keen that it be implemented as soon as possible, yet want to promote diversion under the existing law, in the knowledge that the Bill's implementation may continue to be delayed.

The group of reformers demonstrated a large degree of knowledge of the availability of diversion options, and the differences between them centred around the issue of whether something that was within a magistrate's power to do but was not specifically mentioned in legislation was available or not. For example, prior to the enactment of the Bill, there is no legislation providing for the use of compulsory school attendance

orders or family time orders but respondent #67 could provide examples of such orders being made by magistrates in North-West Province.

There was also disagreement about the interpretation of the word 'available', some considering that as relating to merely being available as a diversion, others responding in relation to whether an option was available at all. Most practitioner respondents said that community service was available but respondents #63 and #66 (Reformers) pointed out that it was not yet possible to use such a disposal as a diversion option. This reflects the different ways in which the Bill is thought of by different people; it is considered by some to be associated with any use of alternatives to custody, whereas others associate it with a new diversion regime.

In responding to the case vignettes, one of the reformers argued that Sipho should be given a fresh start under the new legislation:

Sipho's previous brushes with the law have happened at a time prior to the new law, therefore there had not been an opportunity to really assess what will work for him. The fact that he has responded reasonably well to his last supervision order is a positive sign. In the early stages of the operation of the new law, we should try giving children the opportunity of diversion, as there has been insufficient options available to them. (#64, Reformer)

This respondent clearly relates both Sipho's offending and the possibility of him being rehabilitated to the law at that time, instead of, or along with, other more traditional criminogenic factors.

The legal changes are perceived as being introduced specifically to benefit children like Sipho:

As this is a Schedule 1 offence it will not be legally possible to send Sipho to prison. What is needed is either an alternative sentence or a diversion, so what would it matter? He might as well be diverted. Alternative sentences and diversion are just two sides of the same coin...

My own view is that we've got to come up with a plan to meet this child's needs, so we might as well do it on diversion. There would be absolutely no point in putting him through the court process, it would have no positives, unless we wanted him to go to reform school and that is not what we want. (#67, Reformer)

The new regime will increase the potential for discretion and reduce the possibility of the law damaging the child. The idea that the law should be changed so as to remove the barriers to Sipho being diverted is also discussed by another reformer respondent who believes that if he is an appropriate candidate for diversion then the fact that he has a previous record and has not previously responded to diversion interventions should not be held against him.

The reformer respondents in general argued for the appropriateness of a therapeutic intervention for Vusi, then raised the issue of the legal problems in their additional comments at the end of the case vignette. It was argued that the current criminal justice system did not have a positive effect, it merely prevented possible positive work being done with Vusi, either by creating inordinate delay or by focussing on the dispute over the facts when that is normal behaviour for children charged with such offences:

A rape case would have to go to the regional court, this could cause a lengthy delay in the process, it could take two or three years – what happens to the child during that time? Diversion should do everything a lot quicker. (#66, Reformer)

The issue of Vusi not making a full admission could be a block to his diversion as there may be matters for the court to resolve before such a decision could be made. It would be possible for that issue to be resolved before the preliminary inquiry, allowing him to be diverted. At the time of writing the legal issues concerning the diversion of Vusi remain unresolved; the Portfolio Committee is debating whether children who rape should be diverted at all or whether only those of a certain age should be dealt with by diversion (PMG, 2003o).

All the reformers considered that Peter was an appropriate candidate for diversion, and were clear that he should avoid a criminal conviction and a criminal record. The possible legal difficulties were alluded to but these respondents thought that the will would be there in the court to divert Peter and a way would be found to do that, whatever the legislation said:

It has never been difficult to divert children like Peter from the criminal justice system in South Africa, and I don't think it will be difficult in the future. The fact is, however, that diverting Peter would be a sensible thing to do. (#64, Reformer)

The reformers suggested that it would be possible to divert children like Zanele even under the current system. The only potential obstacle to Zanele's diversion is her lack of remorse. Diversion is dependent on the consent and co-operation of the child who is being diverted so it is possible that a child who does not express remorse and who does not acknowledge that what she did was wrong may have to be prosecuted. However, even the respondent who was concerned about her attitude suggested that counselling and community service would be the most appropriate disposal.

The reformers raised concerns about the Bill's implementation, funding and the attitudes of some of the personnel within the criminal justice system. There was also some sense that the details of the legislation had not yet been worked out:

What are the implications of level 1 diversion? Who will monitor that? Such orders as the good behaviour order are nice to have but are they workable? The peer association order also raises constitutional questions. (#66, Reformer)

The practitioner respondents' views can be characterised as a compromise between the belief that legislative reform is necessary and a commitment to make the best of the existing legislation; this is also reflected in the views of the reformers. Practitioners in South Africa are used to being promised changes that are delivered either after a lengthy wait or not at all (the comparison that one respondent (#54, Prosecutor) made to the provision of AIDS drugs is an apt one) and many of them are now seeking to make the changes themselves without waiting for the legislation. This is also a reflection of the current legislative vacuum that, for all its faults, does allow a degree of discretion and freedom to individual practitioners and individual courts.

While strongly in favour of the new legislation all members of the reformer group were also clear that best diversion practice in child justice did not have to depend on law reform; it was possible to divert most children even under the existing, flawed legislation. The most creative practitioners are able to find a way to treat children

appropriately at present so it appears that the goal of the new legislation is not simply to change practice but to make best diversion practice more uniform. This means that the need to publicise the legislation and ensure that resources are made available in all geographical areas is as important as the campaign for legal change.

The delay in the implementation of the legislation has allowed practitioners to take a flexible approach to diversion, and this is being encouraged by government and by NGOs. The eventual implementation of the Bill is expected to lead to this approach becoming more universal and more consistent.

Context: Children's Court Conversion

Although it was not mentioned as a possibility in the questionnaire, some respondents suggested that they might like to convert some of the cases into Children's Court cases so that they were dealt with outside the criminal justice system. This was considered by some to be a form of diversion, others referred to it as a conversion, a different process. It is beyond the scope of this thesis to consider the Children's Court and the care system in detail but it is worth considering what might be the intention behind the decision to convert a case. The relationship between the welfare system and the criminal justice system is discussed in chapter one of the literature review.

Conversion was only mentioned with regard to two of the four children: Sipho and Zanele. Two Eastern Cape respondents from the One Stop Centre interviewed together (#6, Magistrate and #7, Prosecutor) said that they would like to convert Sipho's case, stating that this was because he needed more treatment than was available through the criminal justice system. One of those respondents (#6, Magistrate) said that he would also consider Zanele for conversion. One further Eastern Cape respondent (#8, Probation Officer) stated that Sipho should have been dealt with in the Children's Court at age 13, that diversion was the wrong approach at that stage. The only Eastern Cape respondents who mentioned conversion at all were these three, who all worked in the One Stop Centre. Outside that centre, conversion to the Children's Court is not something that is considered by practitioners in the Eastern Cape.

In the Western Cape the position is different, and conversion to the Children's Court is more frequently recommended. Eight of the respondents (30% of Western Cape respondents) mentioned a Children's Court conversion with regard to Sipho, and five of those eight (#32, #33, #34, #35 and #36, all probation officers in the Cape Town area) felt that the best disposal for Sipho was a Children's Court conversion and then a placement in a residential facility.

The same respondents who considered the Children's Court for Sipho also considered that conversion would be an appropriate process for Zanele. This was considered to be a way that she could be placed in a residential facility, so that family work could be done there and she could work towards a possible reunification with her family.

Other respondents (#42 and #50, both magistrates, Cape Town) also mentioned Children's Court conversion in relation to Zanele, suggesting that proceeding under the Child Care Act might be more appropriate than using criminal justice legislation and that it might be the best way to place her in suitable residential accommodation.

The responses indicate that the use of conversion to the Children's Court is a localised approach that is popular in the One Stop Centre and in areas of Cape Town but not considered anywhere else. This may be a reflection of the availability of resources; there would be little point in converting a case if there are no more services available in the welfare system than in the justice system.

Conversion is recommended with positive intentions; probation officers believe that the needs of particular young people can best be met through the Children's Court system. It is also thought that magistrates and prosecutors perceive it as a more serious intervention than diversion so it might be recommended when probation officers have doubts that a recommendation for diversion would be accepted. However, there is evidence both from this research and elsewhere that the results of conversion are not always positive ones (Sloth-Nielsen, 2001). The Children's Court Magistrate interviewed for this research suggested that 10 – 20% of referrals from the criminal

court are inappropriate ones, and she would consider that Sipho would fall into that category, although he might have been an appropriate referral when he was younger. She felt that Zanele was possibly an appropriate referral but ran the risk of being lost in the system once the conversion process had begun.

Respondent #67 (Reformer) also commented in detail on the Children's Court system. She stated that the administrative inefficiency of the system meant that many children whose cases were converted were never dealt with by the Children's Court. She also argued that there was little point in a conversion, as the court would only have four options: sending the child to foster care, sending the child to a school of industry, putting the child back where he or she came from or making no order. This respondent expressed little faith in schools of industry so she saw no point in converting a case.

It is envisaged that when the Bill is implemented there will be little further need to convert cases to the Children's Court, that all matters will be able to be dealt with within the diversion regime. Until then there will be practitioners who continue to see conversion to the Children's Court as a way of solving their problems and avoiding the perceived deficiencies in the criminal justice system.

Discretion: Different Professional Groups

The Bill requires three different groups of professionals to work together in a preliminary inquiry: probation officers, prosecutors and magistrates. One of the regular debates regarding the Bill has been about the relative power and standing of each of these professionals, particularly regarding whether it should be the prosecutor or the magistrate who should be *dominus litis* and have the final say in diversion decisions. It is therefore illustrative to consider what each profession thought about the other professions and whether their decisions would be influenced by what they thought that other professionals might do. Questions six and seven of the questionnaire were particularly designed to elicit views about the practitioner respondents' attitudes to other agencies.

When the results of the four case vignettes are put together (as shown in Tables 30 – 32) 72% of practitioner responses indicated that probation officers thought that prosecutors were likely or very likely to agree with them, and 19% of respondents thought that they were unlikely or very unlikely to agree. The responses regarding probation officers' views of magistrates were broadly similar.

Prosecutors and magistrates were confident that other professionals would agree with them, both with regard to the other legal professionals and to probation officers. There were at most only one or two exceptions to this, and the greatest confidence was shown by magistrates who never thought that probation officers were unlikely to agree and on only one occasion thought that a prosecutor would not agree with their decision.

The one significant exception to this general picture was regarding probation officers discussing Siphos. Thirty-one per cent of probation officers predicted that prosecutors would be unlikely or very unlikely to agree with them, and the same percentage said that magistrates would be unlikely to agree with them. The concern about agreement mainly came from probation officers who wanted to divert Siphos. For example, respondents #48 and #49, who were interviewed together, made it clear that they would consider Siphos for diversion but were unsure about doing this due to the legal requirements and the perceived attitude of other professionals. They thought that the magistrate and the prosecutor would be unlikely to divert.

Any tension or disagreement within the system will come from cases like Siphos, persistent but minor offenders, where probation officers might be keen to divert but be concerned about the response of prosecutors and magistrates. Responses to the question about whether diversion recommendations might be affected by the attitude of other professional groups showed that it was possible that probation officers might defer to their perception of what they thought the legal professionals might do, rather than defend their own professional judgment. As the results above show, any deferment to the legal professionals would lead to a reduction in the use of diversion. If this is the case then it would raise concerns about the introduction of One Stop Centres and how closer working relationships might affect decisions to divert.

Reformers' Views of the Professional Groups

The reformers were asked the question about the views of different professional groups in a different way than were the practitioners. As they were not members of any of the groups themselves they were asked for an outsider's perspective of how they thought the groups might respond, with a view to gaining insight into their own perceptions of possible obstacles to the implementation of the Bill.

The reformers were much more confident of the likelihood of probation officers to divert than either of the other professional groups. In fact there was an expectation that the tension in the new regime would come from probation officers wanting to divert cases and prosecutors wanting to prosecute:

In the early stages of the new law being implemented, with training (hopefully) being delivered, I believe that the probation officers will generally try to push for diversion as much as possible. (#64, Reformer)

References were made to the values of probation officers and the effect of their training that would lead them to look first at the needs of the individual offender, while the other professionals would also be concerned about legal and public policy matters. Probation officers are also seen to be keen on delivering effective programmes and, thus, more likely to divert in the case of a sex offender like Vusi where there is a programme that could meet his needs.

Although the respondents were generally positive about probation officers and believed that they would be likely to divert, there was some scepticism expressed about their role within the system and their ability to maintain their professional stance under pressure from other groups. There is recognition that for diversion to be a widespread success it will be necessary for prosecutors and magistrates to become committed to it.

In contrast to probation officers, prosecutors are seen as a group who will need more convincing with regard to diversion, and are the least likely of the three professionals to advocate diversion:

Prosecutors will concentrate on the fact that the child has been convicted so many times before, has had other opportunities like the life skills programme and has not benefited. They are likely to feel that Sipho has 'run out of chances'. (#64, Reformer)

They are often perceived as being concerned with the law and the particular facts of the case and not being interested in seeing the individual. However there was some recognition of the fact that some prosecutors were keen on diversion and as interested in finding appropriate disposals for the children as the other professionals.

As with the probation officers, one of the dominant themes was that prosecutors had a lot of power and discretion but it was very difficult to predict how they would exercise it, as there was so much variety between individuals and geographical areas. The reformers consider that prosecutors will be the hardest of the three groups to convince of the merits of diversion and that this group may be an obstacle to the successful implementation of the Bill.

There is a generally more positive view of magistrates than prosecutors; they are viewed as being legally aware but more likely to take a wider and more benevolent view than prosecutors:

Magistrates could go either way, but if they are trained and feel enthusiastic about their new role of presiding over the Preliminary Inquiry, then they will probably try to divert as many children as possible. They can bring a balance to the difference in approach between the PO and the prosecutor, hence their vital role in chairing the preliminary inquiry. (#64, Reformer)

The decisions of Magistrates are, again, considered to be difficult to predict, and variable according to geography.

The attitude of the reformers to the professionals provides greater insight into their desire to have new legislation implemented. They are confident that the best and most committed of the magistrates and prosecutors will divert but believe that there needs to be legal change before there can be any consistency of approach. The reformers are more confident about the desire of probation officers to divert but they believe that the probation officers do not feel that they have the influence in court to impose their will on the legal professionals. Again, a change in the law could address this.

The responses of the practitioners to the questionnaire show that there is little difference in the attitudes of the professional groups. In most cases, they will reach similar decisions after considering both legal and personal factors. However, in more contentious cases, such as Siphos, it is probation officers who are more likely to consider diversion despite their lack of confidence in the legal professionals supporting that judgment. It remains to be seen how often the recommendation of a probation officer will affect the final decision of the preliminary inquiry but the legal professionals are open to the possibility of considering the probation officer's views.

The debate about whether the prosecutor or the magistrate should be *dominus litis* and have the final say on whether a young person should be prosecuted is an important one and will have significant procedural implications. This research indicates that it may make some difference to the final decision on diversion, as magistrates are slightly more likely to divert. As the Bill currently stands, magistrates do have this final say, and this position would be the better one if the goal of an increased use of diversion is to be achieved.

The Bill provides for the introduction of One Stop Youth Justice Centres, and some of these Centres have been created in anticipation of the Bill. These Centres will provide for particularly close working relationships between probation officers, prosecutors and magistrates, so it is worthwhile to consider briefly the responses to the case vignettes in the Centre where the questionnaire was administered.

One Stop Centres

The questionnaire was administered at one One Stop Centre, it was completed in a group by the magistrate, the prosecutor and a probation officer; another probation officer (who was directly employed by an NGO) completed the questionnaire separately.

There was some evidence from the responses given that the desire to reach a consensual decision led to other professionals deferring to the magistrate, and that this led to a diminished likelihood of diversion. The respondents were all unlikely to divert Sipho, saying that one chance at diversion was enough. The probation officer who completed the questionnaire separately (#8) stated that he would be likely to divert Vusi but the probation officer interviewed with the legal professionals (#7), possibly influenced by the presence of those colleagues, agreed with their position that he would not be suitable for diversion due to nature of the offence.

However, there was also evidence that the probation officer could reach and support her own view. The probation officer took a different view from the legal professionals, with regard to Peter and Zanele, and was able to defend that position. Both the legal professionals considered that they would be unlikely to divert Peter due to the seriousness of the offence but the probation officer thought that diversion was appropriate and the value of the car should only be a consideration regarding the nature of that diversion. With regard to Zanele, the probation officer said that she would be likely to divert her, but the prosecutor was unsure and magistrate was unlikely to divert. In both cases the probation officer stated that she would stand by her assessment despite the disagreement of the legal professionals and in Zanele's case she expressed confidence that the legal professionals would agree with her point of view once they had had the chance to read her pre-sentence report.

None of the reformers commented directly on the use of One Stop Centres but they are considered to be an important part of the implementation of the Bill (De Lange, 2004).

At the time of completing the questionnaire there was only one One Stop Centre in existence, although further centres have subsequently opened. The use of One Stop Centres is considered to be a positive development and the Bill provides for them to be introduced nationwide. It is too early to be able to state conclusively what the effect of the proliferation of One Stop Centres will be on the use of diversion but the responses to this research illustrate both the dangers and the potential benefits. The main danger is that the views of Magistrates and legal arguments will overwhelm other, more welfare-oriented, considerations and that the views of probation officers will become marginalized. The main potential benefit is that the views of all parties will be given weight and that a consensual decision will be reached that has taken account of all the relevant factors.

Discretion: Values and Discrimination

The way that discretion is exercised is influenced by the values of individual decision makers, and the cultural context within which the decisions are made. In their responses to the case vignettes many of the practitioners make their values explicit. The reformers were perhaps more sophisticated in their responses than some of the practitioners and no strong prejudices or religious views were demonstrated. They did discuss, sometimes after prompting, issues of race, class and gender with regard to the last two case vignettes.

The most prevalent value demonstrated by the practitioners was the inclination to see children as either good or bad, and not to separate their behaviour from their identity. This will be considered first and then the possibility of discrimination on the basis of race or gender will be discussed.

Children as Either Good or Bad

In the responses to all four of the case vignettes there was a tendency to see each child as either good or bad. This affected the judgment made about their behaviour, the

prediction about their future conduct and the decision as to whether or not to recommend diversion. In short, Sipho and Zanele were seen as bad children and Peter and Vusi were considered to be good children who had gone astray.

Sipho is considered by many respondents to be beyond help because of his lengthy criminal record. It is considered to be inevitable that he will reoffend and his failure to respond to previous interventions is taken as evidence of his intractability. There is a suggestion that the inappropriateness of diversion is not merely related to how unlikely it would be that it would have a positive effect on him but also that he should be punished for his continued offending.

Zanele is also considered to be a child who has inherent problems that may or may not be intractable but are certainly in need of sustained intervention. Some of Zanele's problems are located in the family; the difficulties in controlling her are explained by the lack of a father figure. She is variously described as angry, rebellious, rude, disruptive, lacking values, behaviourally challenged, showing a propensity for reoffending and having a 'mental problem'. Her lack of remorse is treated very seriously and taken as evidence of her rebellious personality:

She displays no remorse. She does not have the motivation to try and change her attitude or at least seek for help. (#52, Probation Officer)

Vusi is seen in a very different light. The words used to describe him include good, innocent, positive, stable, quiet and shy. The facts that his friends influenced him, and that he was drunk when he committed the offence are seen as mitigating factors, and evidence that he is unlikely to repeat the behaviour. He is assessed as in need of redemption rather than punishment:

There is still hope that with the right guidance Vusi could repent. (#25, Prosecutor)

His family is seen as a potential key supportive factor, not a negative influence:

To refer this young person to this programme we must have the co-operation of the parents and a strong foundation of a family support system. (#37, Probation Officer)

Peter is also considered to be a good person who has temporarily gone astray. He is described as good, honest and innocent and spoken of even more highly than Vusi:

It was just a mistake, there was no intention to harm anyone else. He has a lot of strengths; school marks, rugby, athletics, he does not have time to think of committing crime, this was just like a dream. (#37, Probation Officer)

Some of the recommendations made for these children are based more on a crude classification into categories than on a considered analysis of risk and need.

Discrimination on the Basis of Race and Class

There was little direct stereotyping of the two young black men, with the exception of one Western Cape prosecutor who considered Sipho to be a gangster in the making and made some general comments about black children, whom she referred to as 'African':

If he was diverted he would be back in court in a week or two, with a new charge. Alternatively we would lose him, most of the African people live in nearby facilities, they give false names and false addresses and do not come back. Diversion works in about 10% of cases. (#46, Prosecutor)

This idea that there is a group of young people who are beyond the reach of the criminal justice system and diversion schemes is also mentioned by other respondents with regard to 'street children'.

The issue of race is discussed in most detail in Peter's case vignette. The fact that he is white does have some influence on how he is likely to be treated, although most respondents who referred to his race said that they thought that it might be a factor for other decision-makers, rather than themselves. One respondent (#1, Probation Officer) did suggest that car theft was not considered to be as serious an offence amongst white

people, and the same respondent stated that Peter being white was an influence on his decision to divert him.

Being white was associated with access to resources and living a more protected life and this influenced the decisions that were made:

His background, the race thing. He has maybe lived a very sheltered life, when he is confronted with the reality e.g. with a CSO he could get a wake-up call. A back-up system would make it easier for him not to reoffend. Unfortunately many black children do not have the same support structure. (#42, Magistrate)

Speaking more generally, respondents did identify that race could be a factor in decision-making, although many referred to other courts and other areas. Racial factors being considered was thought to be a particular issue where there was a lot of crime with black perpetrators and white victims or where there were cultural misunderstandings.

The lenient approach taken to Peter may not be simply to do with his race; it may be as affected by his class and wealth. The fact that his family can afford to recompense the victim is seen as a point in his favour, and the references, discussed above, to stability and future potential may reflect assumptions about his class as much as about his race.

Although Peter's racial identity is not always directly mentioned by the reformer respondents, references to his potential and his prospects could be interpreted in that way. He is clearly seen by the reformers as someone who could achieve a lot in his life:

There is the potential for him to become a fine young upstanding member of the community. He needs serious intervention. We might want to nurture people like him in the future. (#65, Reformer)

One reformer respondent considered the fact that he had had such a privileged background as something that should be counted against him, in the sense that all the mitigating factors that apply to other young people could not be said to apply to him, and his behaviour might be more engrained.

The different experience of white people in prison was referred to by one reformer respondent, a theme that was not mentioned by any of the practitioners:

White people have three choices – become religious, head a drug cartel, or keep quietly to themselves. (#67, Reformer)

At the stage that the reformers were interviewed the issue of Peter's race had been raised by some of the practitioner respondents, so they were invited to comment directly on whether they thought that it would be a factor in the decision to divert him. Although they were all adamant that they would not treat anyone differently because of their race, they believed that others in the criminal justice system might do so. Some respondents went on to provide some tentative explanations for this apparent bias, suggesting that, although white children were more likely to be diverted, black children usually ended up on the same programmes but by different routes. It was also suggested that issues of class and financial status could be as important, or more important, than race.

Discrimination on the Basis of Gender

The differential treatment of girls and boys is discussed in relation to Zanele's case. A different standard is applied to her than is applied to the male offenders; the sexual behaviour of the male offenders is not referred to but it is considered to be one of the factors to be concerned about regarding Zanele:

Is her mother working? What's her behaviour like at home? Would think of a foster placement, she needs a more structured environment. She may be sleeping around using drugs etc. (#38, Probation Officer)

It is also striking how harshly Zanele is judged and it is questionable whether a young man who had committed two relatively minor assaults would have his behaviour pathologised in the way that has happened to Zanele.

As well as the possibility of different standards being applied to female offenders, many respondents also raised the issue of differential provision. It was considered that it would be extremely difficult for her to be placed in a suitable residential placement, as there were so few places available for girls. The enthusiasm with which some respondents discussed the possibility of transferring her case to the Children's Court is perhaps a reflection of the lack of provision for female offenders in the criminal justice system. The issue of adequate provision also has a racial element; it was considered to be more difficult to place children who did not speak either Afrikaans or English.

There was a tendency among some of the practitioners to judge Zanele, and the other young people. This was less evident among the reformers but it was not entirely absent. Many of the reformers did not explicitly refer to the particular issues that would be faced by Zanele as a girl within the criminal justice system but it was mentioned by one that diversion programmes welcomed girls as they felt that mixed gender programmes often provided positive results. It was also suggested that Zanele's involvement in offending was not so much an indicator of a burgeoning criminal career as an indicator that she may develop other personal and social problems:

She would not have an escalating criminal career but she would probably get into trouble again. If she stays out of school she could end up with a boyfriend who could get her into drugs, so she could end up involved in prostitution, early pregnancy, first baby at 17 etc. (#67, Reformer)

There has been little research carried out in South Africa into female offending and one of the respondents suggested that this was because there was a much lower rate of female offending. There was also reference made to the lack of provision for girl offenders in South Africa, and that this may have led to proportionately more girls being diverted.

The tendency of some practitioners to base their assessments on subjective, possibly judgmental criteria such as the perceived goodness or otherwise of a young person could be seen as another symptom of the absence of clear assessment criteria. Practitioners have a lot of power and discretion but little clear guidance as to how it should be used, so rather than making decisions on the basis of factors such as risk,

responsivity and criminogenic need, children are typified into good and bad categories. This practice also allows the possibility of decisions to be made that are discriminatory on the basis of race or gender.

Children's Rights: Prevention of Harm

One of the prevailing arguments with regard to the need for a new diversion regime is that the current criminal justice system, and in particular the use of custody, is harming children and so is detrimental to their rights. This way of thinking was extremely prevalent among the reformer group, who rarely thought that the process of conviction and sentence was even neutral; they believed that it actively caused damage to children. One respondent expressed this view strongly and directly in her introductory comments:

As an alternative to the quagmire of prison it is easy to be persuaded by diversion, even incompetent and inept diversion. (#67, Reformer)

This concern was also evident in the responses of the practitioners, and was particularly expressed in their answers to the question about the possible harmful effect of custody.

Only 6% of practitioner respondents said that they would be optimistic about the effect of custody on Sipho and the most frequently expressed reason for pessimism was that a custodial sentence actively damages all children. A number of examples of ways that custody could damage children were cited, including that: there are no rehabilitation programmes available in prison; their behaviour would be negatively affected by coming into contact with more serious offenders; they might end up in an inappropriate institution, due to the lack of availability of suitable placements or that they will be stigmatised and labelled. There were also less specific points made, such as that children would 'graduate' in prison, or become 'hardened'. The only positive points made about prison were that it might shock Sipho or that it might have some effect if he was able to undergo programmes whilst in custody.

Some of the same reasons given regarding the damaging effect of custody on Sipho were repeated with regard to Vusi. There was more optimism with regard to the effect

of custody on Vusi than that expressed with regard to Sipho, but this was explained by reference to his personal qualities, rather than the effect of prison.

The concerns listed above were also expressed with regard to Vusi, along with the fear that he might be exposed to alcohol and drugs. A surprisingly high number of respondents mentioned a fear that Vusi might be the victim of sexual assault while in prison. Eight out of fifty-three (15%) practitioner respondents mentioned sexual assault directly. Some respondents thought that this could lead to him receiving a wrong message regarding sexual abuse, while others were merely concerned that he should not be victimised. No respondents directly mentioned the idea that it could be the nature of Vusi's crime that made him more prone to being victimised in this way so it is not clear if that is their belief, or if it is just the mention of sexual offending in his case vignette that has reminded them of their concerns regarding imprisonment.

Sixty-eight per cent of respondents said that they would be pessimistic about the effect of custody on Peter and the same reasons were expressed as had been mentioned in relation to Sipho and Vusi. Some respondents used extremely dramatic language and believed that the effect of incarceration on Peter might be worse than for the other young people, perhaps because he is perceived as having the most to lose:

Custody would break him. (#6, Magistrate)

I wouldn't let a juvenile like that go to custody (fixed address, good background) it would just traumatize him and mess him up. (#45, Prosecutor)

Zanele was considered to be the least likely of all the children to receive positive benefit from custody. In addition to factors previously mentioned there was concern expressed that it may be particularly hard to find an appropriate place for her, as she was female and not Afrikaans speaking, and there was concern that she might be recruited into a gang. It is perhaps a reflection of the way that female offenders are thought of that the respondents reserved their most drastic predictions for Zanele; one described her as a potential 'throw away the key case' and another suggested that she might die in prison.

As this was the first case vignette to be dealt with, many of the reformer respondents took the opportunity to express their general views about the criminal justice system and

the use of custody when discussing Sipho, then referring to those answers in the later case vignettes. There was also some particular concern raised about Sipho himself and the effect that incarceration would have upon him:

Removing him from his mother, who is the person to whom he has the strongest emotional attachment will be harmful to him at a time when there is a real opportunity for him to rebuild his relationship with her. (#64, Reformer)

Not all custodial sentences are the same and the point was made both by the reformers and by some of the professionals in the Western Cape, that the effect on the children might be different depending on whether they were sent to prison or reform school. However, even a reform school sentence would remove the child from their family and introduce them to the revolving door of the criminal justice system. Even well run and adequately resourced reform schools will raise difficulties in extremely deprived areas:

The secure care facilities are often not bad but the children get caught in a cycle of Horizons, Pollsmoor, Bonnytown. There is also a question of why should children who offend get access to things that children in their community do not have access to. (#67, Reformer)

The reformers were even more certain that Vusi would be damaged by prison, and that any involvement in the criminal justice system, even prosecution followed by a rehabilitative sentence, would be damaging. One reflected that the specific needs of adolescent sex offenders are not met in prison:

Therapeutic and educational programmes dealing with specific offences are almost non-existent in prisons and reform schools.... he would not be asked to account for his actions in any direct manner or be given any positive input aimed at changing his behaviour. (#63, Reformer)

Three of the five reformer respondents, however, did not feel that Vusi would merely be negatively affected by the absence of appropriate services; they felt that he would be likely to come to physical harm in prison. With regard to Peter, there is similar concern amongst the reformers not just about the possibility of him being sent to custody but also about the effect that simply being involved in the criminal justice system and receiving a criminal conviction might have on him. The desire to create diversion

interventions for child offenders is not just about protecting potential victims and rehabilitating the offenders, it is at least partly motivated by a desire to prevent the offenders themselves from coming to harm.

The responses of both this group and the practitioner group indicate that it would be highly unlikely that Peter would receive any form of custodial sentence. When asked about the possible effect of such a sentence on him the respondents echoed their previously expressed concerns about the damaging effect of prison and suggested that placing an offender label on Peter could lead him to commit future offences. There was, however, in contrast to some of the other children, some optimism expressed that Peter might have enough internal strength and family support to survive prison and gain something from the experience. It appears that this group's concerns about Peter are much more related to the damage to his reputation and his school career than the actual effect of prison, which at least some respondents believe that he could survive relatively undamaged.

Although there was less discussion of the effect of the criminal justice system on Zanele than there was with regard to Peter, one reformer respondent felt that a girl of her age should not be in the criminal justice system at all. Other respondents concentrated on the negative effect that prison would have on her; some thought that the aggression that she showed would be aggravated by a spell in custody.

There was little evidence from the practitioners that they shared the view of the reformers that prosecution in itself was damaging. In fact, the opposite view was taken by respondents who suggested that young people could be prosecuted and then placed in diversion schemes without any negative consequences. If the rationale for placing most emphasis on providing schemes for children as an alternative to the court process was that prosecution would in itself damage children this view is not shared by the professionals in the criminal justice system.

It is striking that none of the respondents referred to any possible positive outcomes of incarcerating any of the children. Arguments about holding children to account,

satisfying the victim's desire for retribution or apology, protecting the public or the need to punish wrongdoing are all conspicuous by their absence. The damaging effect that custody is perceived to have would outweigh any possible positive benefits of incarcerating a child. There was only one direct mention of labelling theory as the respondents concentrated more on the actual, practical harm that could be done by the process of conviction and sentence, rather than the more abstract but longer term damage of being labelled as an offender.

Both the inappropriate placement of children in custody and the damaging effect that custody can have are well documented in South Africa and have been publicised by Child Justice campaigners (Skelton, 1998; Fagan, 2004). The combination of their access to this information and their own personal experiences and values has led to the vast majority of the professionals who responded to the questionnaire expressing conviction that incarceration will damage children. It is probably this, above all other factors, that should lead to the Bill being implemented by practitioners who are broadly supportive of its aims and motivated to see it succeed.

Children's Rights: Geographical Differences

South Africa is a vast country with significant disparities between different provinces and between rural and urban areas. It is possible that the implementation of the Child Justice Bill will vary in different areas and that how children are dealt with will depend, at least partly, on where they live. As this research was carried out in both the Eastern and Western Cape and in both rural and urban areas it is possible to make comparisons between the responses made in these areas.

One question in the questionnaire was specifically designed to elicit responses relating to geographical differences, and to encourage respondents to consider whether they were unable to recommend particular options that were not available. Responses to this were complicated by the fact that some diversion options mentioned as examples in the questionnaire were not available anywhere, as the Bill was yet to be introduced, but it was still possible to draw some conclusions from the responses.

The journey programme, the YES programme and house arrest were all stated by practitioners not to be available in the rural Eastern Cape. The Big Brother/ Big Sister programme was said not to be available in a particular area of Cape Town. The most commonly mentioned example of something that was not available was a Family Group Conference which was cited by respondents in the Western Cape in relation to Sipho, Vusi and Peter:

The Family Group Conference is not legally introduced in our area, and there are too many constraints on a probation officer's time to run them. The criminal justice system seems not to be knowledgeable and in favour of it, maybe after the Bill that will change. (#38, Probation Officer)

Many of the practitioner respondents who did not mention the SAYStOP programme, when asked what they would like to divert Vusi to, said that they would have diverted him to that programme if it was available in their area. It was mentioned by name by one respondent in the rural Western Cape and by nine respondents in the Eastern Cape, in both rural and urban areas. At the time that the fieldwork was carried out SAYStOP had carried out some initial training in the Eastern Cape and had run a pilot group but had not yet extensively rolled out the programme.

One of the reformer respondents (#66, Reformer) had suggested that Sipho be dealt with by means of quite a complex, intensive intervention involving both individual and family work, along with a residential, outdoor programme. He doubted that this would be available in rural areas. However, another reformer respondent (#67, Reformer) argued that practitioners at the preliminary inquiry should not be concerned about what might be available elsewhere; they should make a plan creatively using existing resources.

It is generally acknowledged that services for child sex offenders vary according to region and this is accepted by the reformer respondents, who all recommended the SAYStOP programme but stated that it would not be available everywhere. The reformers did not make suggestions about what should be done with Vusi if he lives outside the areas where specialist programmes are available.

It was thought by all reformers that there would be little difference in how Peter or Zanele were treated across South Africa, and all the options that they had suggested would be generally available.

In summary, the main diversion options that are dependent on geography are Family Group Conferences and the SAYStOP programme for child sex offenders. These are significant sentencing options and the geographical disparity in their availability does have general relevance. These are programmes that are closely associated with the Bill and training has been carried out in delivering them. If the implementation of the Bill leads to similar training being carried out in a similar way with regard to the other diversion options that are to be introduced then the geographical disparity in sentencing may be amplified.

The discussion of what options were available in their area showed that there were particular options that were perceived as more available in the Western Cape than the Eastern Cape, as demonstrated in Table 17.

This research was carried out before the Bill was enacted so it is difficult to draw definite conclusions from the results. It can only be assumed that respondents were referring to informal demands made by sentencers when they said that positive peer association or compulsory school attendance orders were available as they had not been introduced at the time that the questionnaire was administered. The difference in language used to refer to similar processes also confused matters: the relatively high number of respondents who said that Victim Offender Mediation was available in the Eastern Cape may simply reflect a difference in the use of language; Western Cape respondents may be more familiar with the term Family Group Conferences. However, it is noticeable that the diversion options that are most dependent on resources are more widely available in the Western Cape: Attendance Centre Orders were said to be available by 39% more Western Cape respondents than Eastern Cape, Supervision Orders by 22% more, Residential orders by 19% more, counselling or therapy by 19% more and community service orders by 14% more.

This impression was reinforced by the answers to the question regarding what option each young person should be diverted to. Table 27 illustrates the regional differences in answering this question, in relation to the diversion options that were most popular with the respondents. Again, the options that are dependent on resources are more likely to be recommended in the Western Cape. The options that a practitioner could deliver himself or herself, such as counselling or setting up a conference were more popular in the Eastern Cape. This does not appear to be solely true with regard to the criminal justice system; Children's Court Conversion was primarily mentioned by Western Cape respondents, suggesting that the resources to deal with children in the care system may also be inconsistently available. This impression was confirmed by the discussions of the Department of Social Development Portfolio Committee that questioned why there were fewer services generally in rural provinces, than in cities (PMG, 2004g).

Answers to other questions in the questionnaire showed no regional disparity; there was strong agreement everywhere with the principle of diversion and there was almost exactly the same response to the question about how likely a young person might be to be recommended for diversion, as seen in Table 24.

All areas of South Africa are awaiting the implementation of the Bill and it is not yet clear whether the intentions will be matched with resources. However, there is no evidence from this research that there is any difference in attitudes to the Bill, or in attitudes to the diversion of young people between the two regions, so any difference in services that did become apparent after its implementation would suggest a disparity in the allocation of resources. There is some evidence that this disparity is already present, as some diversion options, including SAYStOP, NICRO YES and Community Service, are more widely recognised and recommended in the Western Cape than in the Eastern Cape. If children's rights under the constitution are to be protected it is important that the resources for the Bill are made universally available and that regular monitoring is done into the possible geographical differences in the use of diversion.

Diversion: Bifurcation

A bifurcation process that seeks to reserve incarceration for those who prove a risk to the community whilst finding community based penalties for less serious offenders is often associated with an increased use of diversion, and an increased use of custody. As the Bill proceeds further through the parliamentary process it is increasingly likely that some children's experience of the criminal justice system will be a lenient, rehabilitative one while others will receive harsh punishment.

Many practitioners in this research took the view that the benefits of diversion should only be available to first-time offenders, and that repeat offenders should be dealt with through the full legal process. The reformers were more inclined to suggest that effort should be made to divert every child.

Sipho is the child who is least likely to be recommended for diversion by the practitioners and the reasons for resisting his diversion are revealing regarding what sort of child offenders are likely to be excluded from diversion schemes. There are three main reasons offered as to why he should not be diverted.

Firstly, the most common reason given for not diverting Sipho was that he has been diverted before. Respondents suggested that diversion options should only be offered once. Placing a child on a diversion programme rather than prosecuting them is perceived as giving them a chance and once they have had that chance not taking it is their own responsibility:

He had several chances in life and he did not make use of it. Diversion is an option not a right and he had a lot of options. (#57, Prosecutor)

The child who has clashed with the law is given a chance once so Sipho was diverted before and previous intervention treatment has failed and therefore must be referred to normal court. (#22, Probation Officer)

Respondents emphasised that Sipho had been through victim offender mediation previously but had not complied with the agreement that was made. This was seen as evidence that he was not serious about making changes in his life.

There are a limited number of diversion programmes available and it is believed that each programme could only be effective once. So, if Sipho had already undergone the diversion programme available in his area there would be little point in diverting him again, as it would just be to the same programme. This, perhaps, identifies a weakness in basing the diversion regime so strongly around programmes as it does not allow an individual worker, or team, to respond with imagination and flexibility to a repeat offender like Sipho.

Theoretical perspectives that would allow more than one diversion for a child offender, such as stages of change theory (Prochaska *et al.*, 1992) that suggests relapse is a normal part of the change process, are entirely absent from the responses.

The second reason given for not diverting Sipho is that he has a number of previous convictions. This is connected to the previous point, but is a separate argument as it brings in elements relating to Sipho's intractability and the need to punish him. Forty-seven per cent of respondents stated that Sipho's previous record had the greatest influence on their decision not to divert him. For some respondents that was seen as a strong enough reason on its own not to divert Sipho as diversion should be reserved for first offenders:

One of the main objectives of diversion is to prevent a criminal record – which is no longer possible. (#43, Probation Officer)

“He has been through programmes before, my attitude is if the child has had opportunities and not taken them then I will impose harsher measure. (#42, Magistrate)

Those who felt that Sipho should be treated punitively did not express any greater optimism regarding the effects of custody than those who wanted to divert him. The argument that diversion would not work was not combined with an argument that

incarceration would in some way reform him. The only possible positive value of imprisonment was seen to be the shock effect and the possible availability of programmes.

Sipho is largely seen as being beyond reform and only worthy of punishment. Again, the absence of particular theoretical perspectives is striking, there is no suggestion that it might be possible or desirable to engage with higher risk, repeat offenders to attempt to change their behaviour.

The third reason given for not diverting Sipho is that he should be prosecuted, and then referred to a programme, as the Bill allows diversion options to be used as sentences. This was a much rarer suggestion than the punitive responses discussed above but most respondents did suggest, in some way, that a programme would be more appropriate for Sipho, instead of or as well as punishment. Those who were reluctant to divert Sipho but did not want him to be incarcerated struggled to find a coherent response: prosecuting him and then putting him on a programme would lead to the same problem of him undergoing an intervention that had seemingly failed to halt his offending before. Some respondents attempted to resolve this by suggesting that his case should be converted to a Children's Court Inquiry and that he should be dealt with through the welfare system.

Vusi was much more likely to be diverted than Sipho, with over 75% of respondents saying that they would be likely or very likely to divert him. However, there were those who would not divert him and those who would only divert him if certain conditions were met. The two main reasons given for the reluctance or refusal to divert Vusi were that he did not admit the offence or the nature and seriousness of the offence meant that diversion was not appropriate.

Some respondents considered that there were aspects to this offence that made it impossible to divert Vusi. This particularly relates to the possibility of him being charged with an offence of rape. If that was the case then it was thought by some to be appropriate or compulsory to prosecute Vusi, and then to consider putting him on a

programme. There were other aspects of the offence that were thought to aggravate it and make diversion less appropriate such as the age of the victim and the fact that she was his sister.

Vusi's attitude was also considered to be a reason not to divert him by a small number of respondents. Some thought that his denial would necessitate court proceedings to establish the facts of the matter; others considered denial to be an indicator of lack of remorse. Zanele's lack of remorse caused greater concern. She was likely or very likely to be diverted by 67% of the respondents, leaving a significant proportion who showed some degree of reluctance to divert her. The reasons cited for this reluctance to divert included her lack of remorse, her general attitude and her previous offence. The reaction to her attitude was sometimes an emotional one, rather than a considered professional response:

She is rude and she does not show respect for her elders. (#5, Prosecutor)

Her negative attitude that she is rude and disruptive. (#60, Prosecutor)

Respondents were also willing to make inferences from her perceived lack of remorse, such as that her mother cannot control her, or that she is:

Disturbed emotionally and psychologically. (#24, Probation Officer)

Respondents who were able to consider Zanele's lack of remorse as normal teenage behaviour, or a typical first response to being accused of an offence, were more likely to divert her. The same could be said about her general attitude; some respondents referred to that as normal teenage behaviour while others saw it as evidence of deeper problems.

Most respondents did not consider that Zanele's previous caution should prohibit her from being diverted but a small number of practitioners were unwilling to divert, as they perceived the start of a pattern of behaviour.

Peter was highly likely to be diverted, 83% of respondents saying that they would be likely or very likely to divert him. Peter is typical of offenders who will benefit from the diversion regime. Any reluctance to divert him was related to the seriousness of the offence that he committed. There was reference made to the value of the car, the pre-meditation involved and the fact that Peter acted alone. One magistrate referred to the legal restrictions regarding diverting more serious cases and his response was characteristic of those who were not willing to divert Peter:

The offence cannot be classified as less serious, the court must adhere to High Court decisions. The car was locked; it was a planned theft. We would need to know the actual value of the damage. He could be charged with at least 4 offences: he's 16 years old so an underage driver; no insurance; no licence; involved in an accident, so reckless driving. (#6, Magistrate)

Although arguing against diversion those respondents who would not divert did not go on to make a case for incarceration; they felt that Peter should be prosecuted and sentenced but that the sentence should have a rehabilitative element.

The reformer respondents attempted to find a way to divert all the children but there was an acknowledgement that Sipho's opportunities to be dealt with by way of diversion would be limited:

Diversion now should be seen as his 'third strike' – once more and he's out. (#65, Reformer)

In summary, the factors that would prevent a child from being recommended for diversion would appear to be: having previously been diverted, having previous convictions, having committed a serious offence, failing to show remorse or failing to demonstrate a positive attitude towards diversion. Of these factors, the most important to the respondents appear to be previous diversions and previous convictions, leading to a situation where Vusi is more likely to be diverted after committing an offence of rape than Sipho is after being present when his friend stole a CD.

The inclination to divert a serious offender and prosecute a minor but persistent one contrasts with the views expressed by the Department of Justice Portfolio Committee.

Its primary concern was not about persistent minor offenders but about serious offenders (PMG 2003a, 2003d, 2003e). The committee was concerned that children who had committed serious offences, such as rape, would be diverted too easily, perhaps to attend inadequate and undemanding programmes (PMG 2003d). The responses to the questionnaire indicate that the Committee was right to be concerned, and if it is not its intention that children who have committed serious offences be diverted routinely then that needs to be stated in the legislation as practitioners will be inclined to divert at least some of them, given the opportunity.

Rehabilitation

Rehabilitation is a prominent theme in the practitioners' discussion of the case vignettes. The respondents who want to divert the children make a case for their chances of being rehabilitated and those who are reluctant to divert refer to factors that could hinder or prevent the opportunity to rehabilitate. The need to rehabilitate child offenders has been publicly discussed in relation to the Bill but the primary discourse has been one of children's rights. It is perhaps surprising, therefore, that in discussing the case vignettes the respondents made much greater reference to the need to rehabilitate the children than to the need to protect their rights.

When the practitioners were asked about whether they supported the Bill, the vast majority agreed with its principles (93% agreed or strongly agreed) and they explained this in relation to their support of the principle of rehabilitation. There are many references to giving children chances or allowing them the opportunity to change. Some professionals consider the rehabilitation of children to be an inherent part of their job:

To divert children away from the criminal justice system, this is what probation officers are employed for. To give the children the second chance, it's a must. Because when he/ she committed the crime for the first time we thought it's a mistake. (#24, Probation Officer)

The desire to rehabilitate child offenders will be discussed in relation to three of the four case vignettes; there were strong rehabilitative sentiments expressed with regard to Vusi's case, and these attitudes will be analysed in the section on child sex offenders.

Fewer respondents recommended Sipho for diversion than any of the other children, but those that did believed that there was potential in him to change and were keen that he be rehabilitated. Only 35% of practitioners said that they were likely or very likely to divert him and those respondents believed that his background influenced his behaviour and he should be given a chance to reform:

The environment he grew up in has an impact on his criminal behaviour, circumstances are not always the same which leads the young offender to be arrested to commit an offence. Sipho shows to have the potential to change from criminal. (#1, Probation Officer)

The desire to rehabilitate Sipho was also demonstrated by the options that were recommended for him if he was to be diverted, it was felt by some that he should be compelled to return to school and should undergo counselling or supervision either in the community, or in a residential placement if necessary.

The desire to rehabilitate is often matched by a faith in rehabilitation programmes. Although there was less faith in the effect of rehabilitation on Sipho than on the other young people (49% of respondents said that they would be optimistic or very optimistic about its effect on him) those who believed in the programme tended to do so very strongly:

[I would be optimistic because] he would regain the love and care he missed from his father. His mother would have a loving and caring concern for him. He would know that other people do care about him. (#4, Probation Officer)

One consequence of the emphasis on rehabilitation was that those respondents who did not feel that Sipho could be rehabilitated effectively did not recommend him for diversion.

Respondents were keen to divert Peter, with 83% of the sample saying that they would be likely or very likely to recommend him for diversion. Respondents felt that he was not likely to reoffend and did not have an offending profile but many of them were still keen that he should undergo a programme of some sort. One third of respondents thought that Peter should undertake a lifeskills programme, such as NICRO YES, and one further respondent said that he should be recommended for counselling or therapy. The main reason suggested why such programmes would be appropriate for Peter was that he needed to take responsibility for his actions:

[Peter should attend the] YES programme, Peter as a young person does not know the consequences of his actions, he needs to be empowered with lifeskills, he needs to think in a practical way. (#37, Probation Officer)

This was combined with the view that he should undertake community service because it was felt that Peter needed to take personal responsibility rather than just allow his father to pay and to resolve the matter. Apart from this, and a small number of mentions of peer pressure, none of the respondents identified issues that they felt that Peter needed to work on. Their response to the question about his prospects if he were to be incarcerated revealed that many respondents thought that Peter had enough strengths and enough support that he would avoid further offending regardless of what happened to him. Rehabilitation was being suggested for different reasons, as if he should be attending a lifeskills programme in the same way as he would attend community service, to hold him to account for his actions.

Rehabilitating Zanele was also a popular recommendation with 67% of respondents saying that they would be likely or very likely to recommend diversion for her. The most popular diversion option for Zanele was a counselling or therapy order, with 31% recommending such a disposal, and a further 24% of respondents recommending a lifeskills programme. In addition many respondents suggested that Zanele could best be dealt with by converting her case to a Children's Court Inquiry, believing that she could be rehabilitated through the welfare system. Respondents drew conclusions from Zanele's background and upbringing that she was in need of rehabilitation:

She has been brought up by a single parent so she has probably occasionally been left without supervision and there may be unresolved issues regarding her relationship with her father. (#38, Probation Officer)

In contrast to Peter's case, the practitioners were willing to identify issues that needed addressing in Zanele's life. Examples of issues identified included that she had unresolved emotions, and needed to undertake work on communication, relationship-building, self esteem, violence and anger. She was said to require structure, discipline, loving care and therapy. However, practitioners were not able to identify a similar range of programmes that were available to meet Zanele's many needs; usually what was recommended was lifeskills or counselling or a conversion to the Children's Court. As was described previously, there will be no greater range of options available to that court. Anger management was said to be only available to perpetrators of domestic violence.

Perhaps as a result of the lack of availability of suitable options only 54% of respondents said that they would be optimistic that Zanele would avoid further offending if she was diverted. What optimism there was, though, was again related to a faith in the power of programmes to effect change in young offenders:

I would be more optimistic if she underwent a programme than if she was just doing 'hours' somewhere. (#48, Probation Officer)

The reformers made a considerable effort to extract the positive aspects from Sipho's story in building an argument to divert him. They variously mentioned that he was charged with a relatively minor offence, had never committed an act of violence, is only fifteen, was motivated by poverty and had never been subject to an effective intervention. The fact that what was best for him should be the central factor in any decision-making was automatically accepted:

My own view is that we've got to come up with a plan to meet this child's needs, so we might as well do it on diversion. (#67, Reformer)

Apart from the one respondent who mentioned a Family Group Conference the rest of the reformer group recommended that Sipho should attend traditional rehabilitative

programmes: The Journey Programme, mentoring, individual and family counselling and wilderness therapy were all mentioned. Although they did express some reservations about the difficulties in working with Sipho they were generally optimistic that the right rehabilitative programme would have a positive effect on him.

Equally, the reformers focussed on the positive aspects of Peter's biography to build an argument for diverting him. In his case these aspects include that it was a first offence and that he had potential. One respondent suggested that the fact that he was drunk should be a mitigating factor; another respondent assumed that Peter was not drunk and considered this to be mitigating. There was disagreement about whether this was within the realms of normal teenage behaviour or a much more serious matter but it was agreed by all the reformers that some sort of programme of intervention was needed.

Although most of the reformer respondents did take more of a restorative approach to Peter, rather than a rehabilitative one; there was a tendency to combine the conference with another intervention aimed at addressing his behaviour. There was also almost universal optimism expressed about the effect of programmes on him, although some respondents felt that he would be likely to stay out of trouble regardless of whether work was done with him or not.

Again with regard to Zanele there were some reformer respondents who felt that her behaviour was extremely serious, and symptomatic of underlying pathology, and others who considered that it was normal teenage behaviour. They all wanted her to undergo a rehabilitation programme. There was general optimism about the effects of the rehabilitative programmes, albeit it with some caution expressed. This optimism reflects NICRO's publicising of its own programmes as having a high compliance rate and achieving success in assisting children in avoiding further offending (Muntingh, 2001b; Mpuang, 2004).

Rehabilitation was an all-pervasive theme of the responses, and it is striking that although a risk discourse has officially all but replaced a rehabilitative discourse in the United Kingdom, there was no mention of managing risk by any of the respondents,

either practitioners or reformers, in relation to any of the case vignettes. The model of rehabilitation that most of the respondents are working to is not one of a detailed assessment of risk followed by an appropriate intervention, rather it is one where children are identified as capable of reform, or not, and given a chance to address their behaviour.

Restorative Justice

The Bill has become associated with restorative justice and the campaign to implement the Bill has run in parallel with the international movement to promote restorative justice and the greater involvement of victims in the criminal justice system (Skelton, 2002b). The close association between restorative justice and the Bill is seen in some of the responses to the question about preparedness for the Bill's implementation. Some practitioners replied with respect to training that they had received in restorative justice:

I received training in restorative justice and also attended a workshop where the Bill was introduced to us as probation officers. (#2 Probation Officer)

Other respondents suggested that their support for the Bill was connected to their commitment to restorative justice.

Availability of Restorative Justice

There was a general agreement that restorative justice options were available in the Eastern Cape, or that they would soon be made available. Seventy-seven per cent of respondents said that Family Group Conferences were available with a further 9% saying that they knew of plans to make them available. Seventy-seven per cent said that victim offender mediation was available. There was only one respondent in the Eastern Cape who said definitively that none of Family Group Conferences, Victim Offender Mediation or any other restorative processes were available in the area where he worked.

In the Western Cape there was similar agreement regarding the wide availability of restorative justice programmes; 77% of respondents said that Family Group Conferences were available in the area where they worked, with a further 4% saying that there were plans for them to be introduced. Fifty-four per cent said that victim offender mediation was available, with another 4% saying that there were plans for such interventions to be introduced. Some practitioners did express, either directly or indirectly, some confusion regarding the use of the terms 'family group conference' and 'victim offender mediation' but again only one respondent said that neither was available and even she qualified that:

Not available, although we sometimes will consult with the family then postpone to establish the complainant's views. (#46, Prosecutor)

Other respondents from the area where this respondent worked said that restorative justice options were available, through NICRO.

The question about the availability of other restorative justice processes caused greater confusion. In the Eastern Cape four respondents (18%) said that other restorative options were available but only one respondent gave an example of these:

Yes, child can go to victim and apologise and work in garden. None originating in the community – though maybe one in Port Alfred. (#16, Probation Officer)

When this line of questioning was pursued members of the group interviewed in that area were unable to provide any further detail. Of the four respondents (18%) who said that there were plans for restorative processes to be introduced, none could provide examples.

In the Western Cape there were more respondents suggesting that restorative processes were available but again, few concrete examples were offered. Seven respondents (27%) said that other restorative processes were available and one respondent (4%) said that there were plans for these to be introduced. However the only example given was one that described the process as:

A sort of apology. (#43, Probation Officer)

Another respondent provided a list of diversion options that were provided either by government or by NGOs:

SAYStOP, Journey, mentoring, NICRO, Juvenile Offending Programme, Drug Information Schools. (#45, Prosecutor)

The rationale behind including the provision for 'other restorative processes' was to allow the courts to refer children to indigenous, community, restorative justice projects. This provision was excluded from subsequent drafts of the Bill by the State Law Advisor. It would appear from the responses to this question that the original idea to include this option was slightly misplaced. If it was thought that there were a large number of traditional restorative projects already existing in communities that criminal justice professionals could use, then there is no evidence from the responses that the professionals are aware of any such projects.

The reformers' responses to the Section One questions about the availability of Family Group Conferences, Victim Offender Mediation and other restorative processes are revealing about the use of restorative justice and the confusion over terms. Some respondents suggested that there were places where other restorative processes were being used, but it was acknowledged that these were difficult to document.

There was a divergence of opinion amongst the reformers concerning the availability of Family Group Conferences and Victim Offender Mediation. Respondents #63 and #66 (Reformers) suggested that they were available, at least everywhere that NICRO worked, whereas other respondents suggested that the availability of this provision was much more ad hoc; this comment was typical:

[Family Group Conferences] are not widely available. The Restorative Justice Centre does some, NICRO does some, but there is a need for an increase in this service. (#64, Reformer)

The same respondent also identified that there is confusion about the use of the terms Family Group Conferences and Victim Offender Mediation; this confusion is

demonstrated in the responses of the whole population sample. This is a feature of restorative justice that is not restricted to South Africa and reflects the differing origins and practices of restorative justice in different jurisdictions.

The way in which the theme of restorative justice was evidenced in the case vignettes will now be considered.

Case Vignettes

Only a minority of practitioners were keen to divert Sipho in any way (35% of respondents said that they would be likely or very likely to recommend diversion) and a similar small number considered that he would be an appropriate candidate for any form of restorative justice intervention. Six respondents (15% of the sample) said that if they were to divert Sipho a Family Group Conference or Victim Offender Mediation would be an appropriate disposal. Another two respondents suggested disposals involving the victim in some way, one suggesting that Sipho should apologise and another one suggesting that he should pay compensation to the victim. One further respondent said that he would have liked to divert Sipho to another restorative process if it had been available in his area.

Most respondents who suggested diverting to a FGC or VOM saw that as part of a package of measures which could also include such options as counselling and a prohibition from visiting a specified place. One respondent suggested that a FGC would be a good opportunity for Sipho to disclose his own experience of victimisation:

These two options will give all the parties a chance to express their feelings. Especially that the accused was exposed to physical abuse. (#24 Probation Officer)

One of those who mentioned a Family Group Conference was clear that his preference was that Sipho be convicted and sentenced and then undergo a Family Group Conference:

He has too many previous convictions. The FGC can form part of sentence but diversion is questioned. (#8, Probation Officer)

The previous experience of Sipho undergoing victim-offender mediation but not complying with the agreement made was seen as a negative factor by a few respondents, and was stated as a reason for not diverting him on this occasion:

There are lots of people he has offended and asked for pardon and more he has attended victim offender programme without change. (#3, Magistrate)

Some professionals appeared to support the idea that restorative justice should be backed up by a punitive regime, and that those who did not respond to attempts at restoration should be punished. They considered that a family group conference, like diversion itself, is something that a child should have one opportunity to do and if they do not take that opportunity then harsher measures should follow:

[I would be unlikely to divert him because] He has previous convictions for theft. He was diverted on previous occasion, he participated in a victim offender conference and he was under correctional supervision when he committed this crime. (#60, Prosecutor)

However one of the respondents who did want him to undergo a Family Group Conference found some positives in his previous experience of restorative justice and felt that he should be given another chance in light of his change of circumstances:

Family Group Conference because of his attitude – he had a positive attitude to the previous conference and his circumstances have changed positively since then. He has undergone diversion twice with no positive effect, that may have been due to circumstances; he had no positive family support. He is now willing to be involved in a programme. (#38, Probation Officer)

The appropriateness of using Family Group Conferences for children who have committed sexual offences against other children is something that has been debated both in South Africa and in other countries (Dissel, 2004). Over 75% of respondents said that they would be likely or very likely to divert Vusi. Restorative justice was a popular choice of diversion for him: 32% of respondents recommended it although it

was rarely considered as a disposal on its own, it was usually associated with another intervention, such as the SAYStOP programme or another form of counselling. Some respondents were keen to discover the effect of the offence on the victim before making a final recommendation regarding disposal:

The injuries will determine and that is unknown; also the effect that it has/ had on the complainant and the possibility of successful prosecution. (#61, Prosecutor)

Family Group Conference or Victim Offender Mediation was one of two most popular diversion options for Peter. Forty-eight per cent of respondents wanted him to undergo a restorative justice intervention, the same percentage as wanted him to receive a community service order. It was usually recommended alongside another disposal, such as the NICRO YES programme. Even those who did not recommend a Family Group Conference often recommended another disposal that would involve the victim, such as an apology or a compensation order. However, the paying of compensation to the victim was sometimes framed as punishment rather than restoration:

If compensation is accepted his parents could punish him by taking the money saved for him to be sent to University and compensate the victim. (#2, Probation Officer)

Many practitioners referred to the needs of the victim in deciding how to respond to Peter. They were all keen that the victim be recompensed and some thought that the views of the victim could be a determining factor in deciding how to deal with Peter:

A case like this happened exactly, recently in ____, we called the family in and consulted with them, they said that they did not want the child to have a record. We could then charge him with driving without the owner's consent and divert him. (#46, Prosecutor)

Twenty-nine per cent of the practitioners considered some form of restorative justice intervention for Zanele, some combining it with other options, others suggesting that the conference itself should decide whether further intervention would be appropriate. Some respondents were wary of considering such an option because of Zanele's attitude:

Her behaviour and her attitude is not at all restorative. She has little motivation which will be seen by the magistrate as deviant and not worthy for diversion. (#8, Probation Officer)

However, others felt that a Family Group Conference would be the place to resolve such issues, and should be considered before other interventions, including court proceedings:

I would consider a Family Group Conference after speaking to the victim and her parents, I would be prepared to adjourn the Preliminary Inquiry to see what happened at the Family Group Conference. If there was an agreement reached between Zanele and Thandi we would implement that as a diversion. (#45, Prosecutor)

The reformers who referred to Sipho's previous experience with a family group conference considered it to have been something that should count in his favour; there should not be surprise or disappointment that he reoffended after undergoing a family group conference. Indeed this failure to comply with the agreement reached at the conference may not even have been Sipho's fault:

His attitude is good in that he is admitting to the offence, and indicates that a previous contact with a victim was effective (although some may doubt this because he failed to pay back, however it is unlikely that he would have had the means to repay). (#64, Reformer)

However, even those who viewed Sipho's previous experience of a Family Group Conference in a positive light did not necessarily consider a further conference as an obvious diversion option on this occasion. Only one of the five reformer respondents recommended that a form of restorative justice be utilised when asked which option Sipho should be diverted to.

A restorative justice intervention was not considered by any of the reformer respondents for Vusi but some demonstrated concern for the victim of his offence, suggesting that she be included in some form of work, either as part of family therapy or to receive individual counselling and support. Only one of the reformer respondents mentioned a

Family Group Conference directly, and that was to express doubt about its appropriateness.

The failure of the reformers to mention or consider a Family Group Conference in this case may not be a mark of a lack of faith in the appropriateness of such an intervention, rather it may be an indication of the willingness to allow the SAYStOP programme, or another similar specialist intervention, to carry the burden of the work with Vusi. SAYStOP does consider restorative justice to be one of its guiding principles and it uses Family Group Conferences in some cases so the fact that Vusi was not directly referred to such an intervention does not mean that it is entirely excluded.

Peter is almost immediately considered for a restorative justice intervention by some of the reformer respondents and they all want him to undergo some form of meeting with the family who were the victims of his offence. The respondents considered that Peter should participate in the conference but that should not be the end of his involvement; he should continue to be involved in some sort of intervention, either directed by the court or contracted by the conference.

The best way to deal with Zanele created the greatest variety of responses among the practitioner respondents, and this was true also of the reformers. The reformers responded to her attitude to the victim and refusal to apologise in different ways, some considered it to be a barrier to an immediate Family Group Conference but one reformer considered Zanele's refusal to apologise as a point in her favour, as it indicated that she was honest. All of the reformers considered that Zanele should be dealt with in a way that either involved her meeting the victim or addressed her lack of victim empathy. None of them considered that a family group conference on its own would be enough to prevent her from reoffending. Some suggested that a family group conference be made part of a package of interventions.

In the discussions leading up to the Bill it has been claimed that restorative justice is something that could be considered for up to 70% of children in the criminal justice system (Pinnock *et al.*, 1994). It is argued that restorative justice's connection with

traditional justice means that it might be available in areas that the formal criminal justice system cannot reach. In theory, restorative justice could be made universally available as it does not require any extra physical resources beyond trained staff but the replies of the respondents indicate that there is still some geographical disparity. There is no evidence from this research to support the idea that there is a widely used indigenous form of restorative justice currently in use by the professionals consulted that the formal system merely needs permission to gain access to.

When later asked about the extent of their optimism in respect of the effect of the intervention on Zanele and Peter respondents expressed some degree of optimism, but tended to link this to the effect of the other interventions rather than the conference itself. Many respondents associate restorative justice with goals other than just the prevention of reoffending, such as meeting the needs of the victims. Restorative justice's place in the child justice system seems assured, although it is not yet perceived as meeting the need for a response that will address the offending behaviour of children.

Child Sex Offenders

The treatment of child sex offenders under the new Bill is important for a number of reasons. There is considerable public concern about this group of offenders, and the concern that child sex offenders be dealt with appropriately under the new regime is shared by the Department of Justice Portfolio Committee. Child sex offenders have also attracted the attention of practitioners and NGOs and new programmes have been designed to meet the needs of this group of offenders with the Bill in mind; the most notable of these programmes in the Eastern and Western Cape being SAYStOP. Some participants had received most, or all, of their training on the Bill from trainers working with SAYStOP. Child sex offenders are important in their own right and also provide insight into how the Bill will provide for serious offenders with specialised needs. In this research the attitudes of practitioners to child sex offenders were determined through the case vignette of Vusi.

The Department of Justice Portfolio Committee has been considering whether child sex offenders should be eligible for diversion at all but in this research (carried out at a time when the most recently published version of the Bill allowed such offenders to be diverted) over 75% of practitioner respondents said that they would be likely or very likely to recommend that Vusi be diverted. There were some respondents who expressed hesitation with regard to the actual nature of the offence and Vusi's reluctance or inability to give a full account of his actions but there were others who were clear that even if what Vusi had done was rape that he would be a suitable candidate for diversion:

He qualifies for the SAYStOP programme. He is a first offender, he is under 18 years and he admits the sexual assault part. He can be taught that the act is called rape – he needs education regarding this topic. (#8, Probation Officer)

The offence was only considered to be the most important issue by 24% of respondents, the least of any of the four factors suggested in the questionnaire. Vusi's positive personal circumstances and his previously clean criminal record were considered to be the most influential factor by many more respondents than considered the offence to be most influential. Alcohol was seen to be a mitigating factor, and Vusi was also considered to have acted under peer pressure. As previously stated, some respondents were concerned about the fact that it might end up as a rape charge but the fact that the offence was committed within the family had a mixed response. Some thought that was also mitigating while others referred to public disquiet about incest offences.

The availability of a particular diversion programme, SAYStOP, and the publicity that had been given to it were factors in the willingness of the respondents to consider diversion for Vusi. Forty-five per cent of respondents said that they wanted Vusi to be diverted to SAYStOP or to an unspecified programme for adolescent sex offenders. Others identified SAYStOP as a programme that they would have liked to divert Vusi to if it had been available in the area where they worked. Those who knew about SAYStOP, and some respondents were trained facilitators, were extremely confident in the positive effect that it would have on young sex offenders in general and Vusi in

particular. Ninety-two per cent of practitioner respondents were optimistic or very optimistic that if Vusi were diverted he would be unlikely to reoffend:

The SAYStOP programme is good, it is very extensive but it will depend on the individual how much he gets out of it. The programme is very new, there have been few referrals, it is too early to say whether it has been successful but we do not know of any repeat offenders. (#48, Probation Officer)

Custody was seen as being particularly damaging to child sex offenders, both because their needs would not be met and also because they would be at a particular risk of being victims of sexual assault. Some respondents were unwilling to speculate about Vusi's prospects in custody as they were so convinced that he would not be incarcerated.

When asked to consider the views of other professionals with regard to Vusi some probation officers raised concerns that prosecutors and magistrates would not consider Vusi's personal needs as they would only be concerned with the nature of the offence. The responses to the questionnaire show that this is not necessarily the case; prosecutors and magistrates are also willing to consider diversion for children who have committed serious sexual offences.

Of the five reformer respondents, three said that they would divert Vusi and two were unsure. The doubts expressed by the two unsure reformers were not to do with the principle of diverting him, but were with regard to the need for further information and assessment. They said that they would be open to the possibility of diverting him, providing a detailed assessment was performed.

In considering which aspects of Vusi's biography to prioritise in making a decision the reformers focussed on those parts of the story that showed him in a positive light and allowed hope for his future. These perceived mitigating factors included the fact that it was an intra-familial offence (this was said to make diversion easier), that his previous record was clean and his lifestyle was stable. The desire to give him a chance even led to some factors that might have been thought to be aggravating being considered

mitigating, such as the fact that he had been drinking. It also led to potential risk factors being overlooked, such as the fact that he had continued access to the victim.

All the reformers recommended that Vusi attend a specialist programme for adolescent sex offenders, such as SAYStOP. They also recommended other interventions to go along with this, such as family work and work addressing alcohol use and peer pressure. There is unanimity in the belief that adolescent sex offenders are a special group who are amenable to the right sort of treatment that should be made available.

The faith in the programme is again demonstrated by the optimism of the reformers in the effectiveness of diversion, with four of the five saying that they would be optimistic or very optimistic: the only respondent who was unsure admitted being unfamiliar with the research. Generally the respondents had faith both in the programme and in Vusi himself. The respondents were correspondingly pessimistic about the prospect of a positive outcome if Vusi received a prison sentence. As well as their concerns about the damaging effect of prison, the reformers clearly wanted Vusi to undergo a specialist programme and were sure that such a programme would not be available in custody.

The disparity between the responses to the questionnaire and the discussions of the Department of Justice Portfolio Committee with regard to child sex offenders is a stark one. When the Committee originally received submissions with regard to adolescent sexual offences it expressed reservations about sexual offences being considered for diversion at all (PMG 2003c; 2003d). The Chair, Advocate De Lange, expressed concern that children being convicted of rape were being diverted, that the children were not being monitored after completing the programmes and that the programmes themselves were not being properly evaluated (PMG 2003d). Advocate De Lange was concerned that the needs of victims were not being met and that children who had raped were merely being required to complete a ten-session programme (PMG 2003d).

After the March hearings the drafters were sent away to re-draft the Bill in light of the Group's comments, and the amended Bill was reconsidered in August. Advocate De Lange was still concerned about children being diverted for rape offences and

undergoing what he considered to be inadequate interventions (PMG, 2003o). The issue has not been discussed since then so it appears probable that some or all child sex offenders will be excluded from the possibility of diversion under the Bill. The willingness to divert shown by the respondents to the questionnaire and the faith that they showed in the SAYStOP programme was not shared by the Portfolio Committee. In fact, the committee saw its role as preventing the professionals using their discretion in this way. The responses to the questionnaire show that the committee had some justification in their concern that if it was possible to divert for rape that would be done; the respondents showed a readiness to consider other issues to be more important than the nature of the offence.

The final chapter will draw the responses to the questionnaire together with the review of the literature to draw some conclusions about the exercise of discretion in the Preliminary Inquiry under the Bill.

CONCLUSION

This final chapter of the thesis will draw together the literature review and the analysis of the themes from the data collected to answer the research question of how the Bill's proposals appear likely to affect the process of diversion from prosecution for children. This chapter, like the rest of the research, will look both to the present and the future in considering how discretion is exercised in anticipation of the Bill's implementation.

The primary conclusion to be drawn is that, although the Bill will significantly improve the treatment of many children in the child justice system in South Africa, there may be large numbers of children excluded from the new regime. These excluded children appear likely to be those who are persistent offenders or who have committed serious offences; in this chapter this group will be referred to as high-risk children.

This position will be argued by returning to the themes discussed in the literature review and the data analysis. It will be argued that it is the limitations of the dominant theories influencing the Bill that could lead to children being excluded and it will be suggested that there are other theoretical perspectives that could provide at least a partial solution to this exclusion.

The Intention of the Bill

At this stage it is worth emphasising that the original goal of the introduction of formal diversion and the preliminary inquiry in the Bill was not just to divert some children, but most children. Advocate Ann Skelton, speaking while she was employed by the United Nations technical assistance project, providing advice on the development of the Bill stated (Skelton, 2002a:4):

The clear intention of setting out a range of options in this way is to encourage those working in the system to use diversion in a range of different situations, even in relatively serious offences.

Professor Julia Sloth-Nielsen, a member of the original South African Law Commission Project which drafted the Report on Juvenile Justice argued that (Sloth-Nielsen, 2003b:3):

Diversion is provided for on a series of levels, indicating that more intensive programmes should be reserved for more complex cases.

So to judge the Bill against the criteria of whether it will meet the needs of serious and persistent offenders is to judge it against the standards set by its promoters and the government itself. In addition, the consensus view of the reformers interviewed for this research was that all four of the children in the case vignettes should be diverted. However, the Department of Justice is now sending a much more mixed message; it states in one place on its website (Department of Justice, 2004b: no page numbers) that diversion should be available for most children:

The new system is designed to cater for the majority of children who have committed crimes and the different levels [of diversion] offer an innovative way of dealing with them.

On the same site, however, there is an indication that it will be a much smaller minority of children who will be diverted (Department of Justice, 2004b: no page numbers):

If a child is generally well-behaved and has committed an offence that is not very serious, such a child will generally be diverted away from the criminal justice system. Not all matters will be diverted, however. Some cases will be considered too serious to divert, whilst in other cases the track record of the child may indicate that diversion would not be suitable.

There is now an expectation that serious and persistent offenders will be excluded from diversion. The idea that diversion should be reserved for the generally well-behaved is a departure from the original intention of the Bill's drafters and supporters.

Context of the Bill

The context in which the Bill is being implemented appears to be contributing to the exclusion of high-risk children from its regime. In the absence of any current legislation, there is urgency in trying to get some legislation implemented, so arguments are made broadly, rather than focusing on any particular group of needy children (CLC, 1992; Sloth-Nielsen, 1999a, 1999b; Gallinetti, 2001a). The government has a pressing imperative to introduce child justice legislation that will comply with its obligations under both international law and the South African constitution (Skelton, 1996). The events of 1994, when children were released from custody without alternative measures being put in place to accommodate them, have led to the government proceeding with caution in an awareness of the need to reassure the public that new child justice legislation will not result in them being put at risk (Skelton, 1996). The Department of Justice Portfolio Committee has been careful both about ensuring that the Bill has been properly prepared for and will be adequately funded but also that children will be treated in a manner that does not diminish public confidence in the criminal justice system (PMG, 2003a). This has led to statements that suggest that high-risk children will be largely, or entirely, excluded from the diversion regime (PMG, 2003o). South African child justice projects have both responded to and contributed to this situation by expending most of their energy in developing programmes for first-time offenders (Muntingh, 2003).

The practitioners who responded to the questionnaire were committed to the idea of legal reform, but often expressed frustration about the delay in the implementation of the legislation and the lack of infrastructure in their area. The nature of working in the anticipation of legislation that had been written, but not yet introduced, led to confusion about procedures for diversion, such as a lack of clarity about what offences were suitable for diversion and whether a particular child could be diverted on more than one occasion. Protocols that state clearly that a previous diversion should not be a barrier to a future one may help this situation, but it is not clear that that is what the legislation intends, nor that such a position would be supported by all practitioners. It appears likely at this stage that particular groups of offenders will be excluded from the regime

(PMG, 2003o), frustrating the aims of those who argued that diversion should at least be considered for all child offenders, regardless of the seriousness of their crimes.

There also remains a lack of clarity about conversion to the children's court. It is still considered by practitioners in some areas as a solution for children with particular needs, but there appears to be a lack of awareness about the limitations of such an approach and the opportunities for such children to have their needs met by a reformed criminal justice system. There does appear to be an element of evading responsibility in recommending children's court conversion, in that none of the practitioners who suggested it were able to discuss with any confidence what happened to children who were thus converted. As long as the option exists of passing cases on to the family court system (and it is provided for in s25 (3) (c) of the Bill) it could act as a disincentive for measures to be developed within the criminal justice system for difficult children with complex needs.

So the context within which the Bill is being introduced has contributed to a situation where measures are being developed for low-risk, first time offenders at the expense of high-risk children. It is politically expedient for the government to exclude high-risk children, and advocates for the Bill will concede that argument because of the overwhelming need to have some legislation enacted, even if it is flawed and limited. Practitioners are encouraged to concentrate on providing for the diversion of lower risk offenders, in the knowledge that resources are limited and that the pending legislation will probably require this, rather than the management of high-risk children. Practitioners' intuition (and perhaps their experience) tells them that it is not worth diverting somebody who has been diverted before. Conversion to the children's court provides a back-up system, albeit not an effective or appropriate one.

The length of time that it is taking to implement the Bill, the high turnover of criminal justice practitioners, and the many changes that have been made from the first draft to the eventual Bill that will be enacted, mean that there will be a need for a universal training programme when the Bill is actually implemented. The level of knowledge

shown by practitioners is variable, and a systematic training programme would be a way of addressing this, as well as responding to some of the gaps in knowledge and practice.

The Use of Discretion by Different Professional Groups

Although there was a willingness to divert demonstrated by all the respondents, this was more evident amongst probation officers than prosecutors and magistrates. The most tension in the system would be demonstrated in those cases like Sipho, persistent offenders, where probation officers might be keener to divert than the legal professionals. Some probation officers, in those circumstances, might have been deterred by this and recommended a different option but in general this should be unnecessary as most legal professionals demonstrated a respect for their probation officer colleagues, and a willingness to take their professional opinions into account. The reformers suggested that, while probation officers were more likely to divert than magistrates and prosecutors, there was so much variation within the country that it would be difficult to predict with certainty what any individual practitioner would do, based on their membership of a particular profession. This view is borne out by the responses to the questionnaire.

The campaign to implement the Bill has been dominated by legal argument, leading largely to an absence of criminological, or other social science theory in the discussions or the literature. If it is the case, as it appears to be, that tension in the system will be caused by probation officers keen to divert arguing against reluctant legal professionals, then it will be important that such probation officers are adequately trained, are able to mount convincing arguments, and can recommend programmes that inspire confidence. The current theories influencing the Bill (children's rights, diversion, rehabilitation and restorative justice) are not alone adequate for this purpose as they will support a system for low-risk offenders much more than one that also includes high-risk children. Probation officers who can understand and discuss the concept of risk, and can state with authority that the programmes that they recommend are effective are much more likely to convince a preliminary inquiry to follow their recommendations.

Values and Discrimination

In the absence of a clear theoretical framework for decision making, it is more likely that decisions will be made on the basis of subjective assessments, and even prejudice (Cavadino and Dignan, 2002; Kemshall, 2003) than if such a framework was in place. There is an inherent tension between justice and discretion, in that to be fair, law must be both predictable and flexible (Hawkins, 1992; Ashworth, 1998).

The respondents did exhibit some discriminatory attitudes, and many suggested that discrimination was likely to be present in decisions made by other professionals within the criminal justice system. This included a more lenient approach taken to the wealthy white offender Peter, and the pathologisation of female offender Zanele's relatively minor acts of aggression. In both those cases, however, there were also many practitioners who strove to treat the child in a fair and equitable way. Despite, or perhaps because of, South Africa's divided past, probation officers and legal professionals do not appear to receive significant training on the need to avoid discriminatory practice, and the techniques for doing so. Teaching on legal and social work courses on diversity and discrimination could assist in reducing the number of situations where potentially prejudicial considerations of race, class or gender affect decisions about children.

The more prevalent stereotyping tendency was the inclination to consider a child as being either inherently good, but gone astray, or intractably bad with a developing pattern of criminal behaviour. If the provisions of the Bill are to be approached in this way then it will lead to first-time offenders, especially those from more privileged backgrounds, receiving the benefit of diversion while high-risk children are viewed as unlikely to respond and prosecuted. A more objective assessment framework would prevent some of these prejudices having such an influence on decision making.

Children's Rights

The promotion of children's rights does appear as if it might be of promise in offering something for high-risk children. It can be argued that all children have rights, and the specific rights provided for in the Constitution, and argued for by some of the Bill's advocates, would appear to have particular relevance for high-risk children (Skelton, 1999; Sloth-Nielsen, 1999a). For example, the provision that prison should only be provided as a last resort and for the shortest possible time period, should have particular benefits for children who have offended persistently (CLC, 1992). The abolition of corporal punishment was a victory for child rights advocates and is clearly of great benefit to all child offenders, including high-risk children (Sloth-Nielsen, 1996; Skelton, 1999).

However, not all the rights of all children are held to be absolute, and they are held in tension with the rights of other groups, such as specific victims, and the public as a whole. Crime in South Africa is a significant issue both nationally and internationally, and the government will not allow the rights of high-risk children to be perceived to be more important than its ability to control crime (Van Zyl Smit, 1999).

Respondents to the questionnaire overwhelmingly accepted that both the use of custody and the criminal justice system as a whole would damage children, particularly children who had otherwise positive factors in their lives. Even reform schools were seen by some as having limited resources, no therapeutic benefit and the potential to do more harm than good. However, this did not always translate into the desire, or ability, to recommend alternatives: even some of those who acknowledged that Sipho would be damaged by custody thought that he should be incarcerated. The analysis of the geographical differences in the responses showed that even if a right is provided for and acknowledged it does not necessarily mean that children will benefit from it. Popular diversion options such as family group conferences and the SAYStOP programme were differentially available depending on the area where the child lived. This disparity should not exist under the constitution and it is possible to argue, as the government does, that the enactment of the Bill will lead to sufficient funding and ensure that all

children will be treated in the same way (Sloth-Nielsen, 2003b). This will be a great step forward, if and when it occurs, but it will require careful monitoring.

So the children's rights discourse on its own will not necessarily lead to high-risk children being diverted. Their rights to diversion can be over-ridden by the rights of other groups in society, and the knowledge that a particular disposal is potentially harmful to children will not be a guarantee that it will not be imposed. Children continue to be treated differently in different areas despite the existence of a legal and constitutional right that should prevent this.

However, an emphasis on children's rights will still be important as the Bill approaches enactment and implementation. The discourse of human rights provides a mutually acceptable language around which civil society and government can unite (McEvoy and Mika, 2002; Sloth-Nielsen, 2003a) and can allow real dialogue to take place. Campaigns that refer to human rights are likely to find favour in South Africa for some time to come, and an emphasis on the rights of children can create common ground between otherwise opposing groups, such as victims' groups and the supporters of child justice initiatives.

Diversion and Bifurcation

It appears to be inherent within the implementation of a diversion regime that some form of bifurcated system will result. In other jurisdictions bifurcation is explicitly acknowledged and even enshrined as policy. For example, in England and Wales young offenders can only receive one referral to a panel; after that they must be prosecuted (Goldson, 2000; Smith, R., 2003) but in South Africa the initial intention had been to create a diversion system that also incorporated persistent offenders and serious offenders (Skelton 2002a; Sloth-Nielsen 2003b; Department of Justice, 2004b). It was hoped that the Bill could provide greater intervention for some offenders whose needs were not being met at all, such as child sex offenders (Redpath, 2002; Wood, 2003). The risk that an increased diversion regime will widen the net of state control and draw new groups of children into the criminal justice system who would otherwise not have

been there is a real one, and has been acknowledged by the advocates of reform (Skelton, 1995; Redpath, 2002). However, it will not be until the Bill has been implemented that it will be possible to say whether it has been successful in avoiding net-widening.

It appears increasingly possible that the diversion regime introduced by the Bill will be a bifurcated one that could exclude both serious offenders and persistent offenders. Each group, however, could be excluded in a different way. It seems from the responses of the practitioners that they are willing to consider the diversion of serious offenders, providing their other circumstances permit it. Vusi was very likely to be diverted for a serious sexual offence because his previous clear record and his perceived positive attitude could be counted in his favour. Peter could be diverted for car theft because he also had a clear record, and could pay for the damage. However, the deliberations of the Department of Justice Portfolio Committee suggest that, when the Bill is finally enacted, such serious offenders may not even be able to be considered for diversion. It seems that the programmes that have been developed do not inspire the confidence of the Portfolio Committee, and it is concerned that they may not be acceptable to the public (PMG, 2003c; 2003d; 2003e). The combination of this legislative exclusion and the situation where programme providers are concentrating on developing diversion programmes for less serious offenders may lead to a situation where children who commit serious offences may not be provided with suitable interventions. Although diversion options, including SAYStOP, will be available as a sentence, the courts may have no more faith in them than the legislators have, putting such children at risk of receiving a residential or even a custodial sentence.

At this stage, it does not seem as if the Portfolio Committee will specifically exclude repeat offenders from the diversion regime and the child justice reformers are keen to offer diversion to those who have been diverted previously. However, probation officers, magistrates and prosecutors do appear unwilling to divert repeat offenders. Sipho was often excluded from diversion, and the reasons given included that he had been diverted before, he had previous convictions and that it was more appropriate for him to receive an intervention after being sentenced. Zanele had only one previous

conviction but this was enough to exclude her from diversion in the mind of some practitioners, even though she had not received any intervention. Emphasis was put on the previous clear records of Peter and Vusi to such an extent that they were more likely to be diverted than Sipho and Zanele despite committing much more serious offences.

The policy of diverting first-time, low risk offenders is likely to be a successful one. Practitioners of all professions are committed to the principle of diversion and the work of the government and NGOs in preparing for the Bill have ensured that diversion is already an accepted practice in courts throughout South Africa. The Bill should have a massive beneficial effect on the treatment of this group of children, and this positive effect is already being demonstrated. It is possible, however, that the new Bill will result in a highly bifurcated system, where serious offenders are excluded by statute and repeat offenders are excluded by practice. The reality may not be quite so extreme, particularly if effort is made to promote the diversion of repeat offenders, but there does remain a risk that the new system will have little effect on the treatment of high-risk children.

Rehabilitation

Rehabilitation is an important influence on the Bill but the critique of rehabilitation raises concerns about it being inappropriately applied: including the wrong children; serving different ends than initially intended; failing to protect the rights of children and being ineffective (Cohen, 1979; Allen, 1981; Hughes, 2001; Asquith, 2002). The Bill will not be vulnerable to all these criticisms in that steps have been taken to protect children's rights and it is replacing a system that is already widely perceived as failing to provide any rehabilitation or reform so it is less likely to cast its net too wide (Skelton, 1995; Redpath, 2002). However, the Bill, and the diversion regimes will be vulnerable to the criticism that they cannot be shown to be effective. Claims have been made for the efficacy of some diversion programmes such as NICRO YES and SAYStOP (Muntingh, 2001b; Wood, 2002) but the research has been based on self-report studies, small samples or work with children who, it could be argued, were already unlikely to commit further offences. There have been no studies in South

Africa that have found convincing evidence of effective work being done with high-risk children, and in the absence of such evidence the South African crime control climate may prevent such programmes being introduced. The international research as to what is effective in working with high-risk offenders has generally not been utilised by the developers of programmes in South Africa.

Practitioners speak the language of rehabilitation much more directly than the reformers, who support rehabilitation through the language of restorative justice or child rights. This had some benefits for some children: for example practitioners were able to look beyond the serious nature of the offences committed by Peter and Vusi and to recommend diversion because they were able to see potential that they would be successfully rehabilitated. However, the corollary of this was that those who could not see potential for reform in Sipho or Zanele did not recommend them for diversion, notwithstanding that their offences were relatively minor. The generally high level of recommendation of diversion by the practitioners in all cases was matched by a high degree of faith in the effectiveness of diversion programmes; if in the future something occurred to jeopardise that faith then it might also reduce the use of rehabilitative programmes. This is true in general terms, but the responses to Sipho show that the logic can also be applied on an individual basis; if a child does not appear to be responding to diversion, he or she may be prohibited from receiving another chance.

The rehabilitation of offenders will continue to be pursued through the discourses of restorative justice and child rights. However, rehabilitation is vulnerable to negative evaluation and can lead to harsh measures being imposed on those who do not appear to be amenable to it. The strong emphasis placed on it by the practitioner respondents suggests that high-risk children are likely to be judged as not suitable for the programmes available and may be excluded from the system if they continue to offend following their first diversion.

As will be discussed below, an emphasis on risk and effective practice could help in the promotion of rehabilitation for higher risk children.

Restorative Justice

The Bill has been heavily influenced by restorative justice; its claims to be of African origin and to be a radical alternative to a European style, retributive system made it very attractive to the Bill's drafters and its advocates (SALC, 2000a; Skelton, 2002b). The Bill was also being developed at the same time as restorative justice was becoming popular throughout the world. Restorative justice has brought a lot to the Bill, and it will continue to be popular among practitioners, sentencers and policy makers after the Bill is introduced but the weaknesses of the restorative justice discourse unfortunately coincide with the weaknesses of some of the other theories and ideologies that have influenced the Bill.

Restorative justice had aspirations to be a replacement for a discredited adversarial system and able to meet the needs of even the most serious offenders (Bazemore and Umbreit, 2003; Hagemann, 2003; Walgrave, 2003), but in many jurisdictions it has been introduced as merely another sentencing or diversion option, often aimed at young, first-time offenders (Smith, R., 2003). It appears likely that this will be the case in South Africa too. Restorative justice interventions will be accountable to the court and often facilitated by large, state-funded NGOs. The legislation permits such interventions to be used with all children who are diverted, or who receive diversion options as a sentence, and there is no specific prohibition on the type of offence or offender for whom it is available. However, there is no indication from the Department of Justice Portfolio Committee (PMG, 2003d) that restorative justice interventions are any more likely to be used with high-risk children than any other diversion options.

Practitioners in this research were aware of restorative justice, although it was not available in every area. They felt some reluctance about recommending it, particularly for a child who had previously received a restorative justice intervention, but it was a popular choice for Peter, who had stolen from a family friend. Vusi and Zanele had also offended against people known to them and that was a reason for considering them for a conference. The Child Justice Bill, diversion and restorative justice have become conflated in the minds of some of the practitioners so there is a strong correlation

between the likelihood of considering restorative justice and the likelihood of considering diversion at all.

Restorative justice is popular, well understood and is likely to be well utilised with low risk children. However, restorative justice may face the same effect as that discussed above in relation to diversion in general: the law may prevent serious offenders from receiving a restorative justice intervention, certainly at least until after a court appearance, and the practice of the child justice professionals may prevent restorative justice options being made available to repeat offenders. What is certain is that restorative justice under the Bill will be tightly controlled and managed, and accountable to the court. It will supplement the child justice system: it will certainly not provide a radical alternative. Although restorative justice elsewhere is used with serious offenders, there is nothing in the restorative justice discourse, as accepted by the South African child justice system, which would allow any extra services to be provided for high-risk children.

Managerialism

Managerialism has been an often unacknowledged influence on the Bill, and is likely to be increasingly prominent as it approaches enactment and implementation (Sloth-Nielsen, 2003a). There are competing views about whether managerialism conflicts with children's rights (Cohen, 1985; Cavadino *et al.*, 1999; Cavadino and Dignan, 2002; Smith, D., 2003; O'Malley, 2004) and restorative justice (Garland, 2001; Crawford and Newburn, 2002; Crawford, 2003). In South Africa, as this is the first time that comprehensive child justice legislation is being introduced, there has been a need for both the early idealism of the advocacy campaign (CLC, 1992) and the more pragmatic business language (ICCJ, 2002; Sloth-Nielsen, 2003a) of the later campaign to see the Bill enacted.

The strictures of management are not evident in the responses of the practitioners to the questionnaire, but perhaps this is only to be expected as the legislation has not yet been implemented and respondents were asked to speculate for the purposes of this research.

The Bill will require management but should not be allowed to merely descend into a bureaucratic, administrative exercise. The removal of the provision that allowed indigenous restorative justice schemes to provide services to the court is a sign that the state is unwilling to cede too much power to local communities and this will have the positive impact of maintaining a consistent service throughout the country. However, maintaining too much power at the centre may also stifle creativity and inhibit the development of local initiatives (Crawford and Newburn, 2002; Crawford, 2003). The practitioners in this research demonstrated a lot of commitment to the principle of diversion, and often devised appropriate, imaginative and demanding interventions for the children to be diverted to. The practitioners also demonstrated a greater willingness to divert children who had committed serious offences than that shown by the Department of Justice Portfolio Committee (PMG, 2003o). The system will have to be tightly managed, while still allowing the use of discretion by practitioners. For the Bill to be a success, there will need to be enough management to ensure the effective working of the system, but the language of managerialism and actuarial justice should not drown out the discourses of children's rights and restorative justice.

Child Sex Offenders

Nowhere is the debate over the diversion of high-risk children more apparent than in the discussion of services for child sex offenders. Those who have advocated strongly for the Bill have developed services for child sex offenders, and much has been made of the inadequacy of the current provision and the overlap between those children who are victims of sexual violence and those who go on to perpetuate it (Redpath, 2002; Van Niekerk, 2003) . Programmes such as SAYStOP have been developed with the Bill in mind, with the idea that interventions can be put in place at a pre-trial stage with children who commit sexual offences. The current criminal justice system has been seen to fail such children, and hopes of reform were high (Redpath 2002; Wood, 2003; Ehlers, 2004).

Practitioners and reformers were both very strongly in favour of the diversion of Vusi, with over 75% of practitioners being likely or very likely to divert. It is worth re-emphasising that although there were many positive factors in Vusi's personal circumstances, his victim had accused him of rape, and he did not seem to be fully accepting her version of events. Nevertheless, most practitioners, of all three professions, found that there was enough to be positive about in his clean previous record and his attitude to be able to divert him. Practitioners were anxious about the effect of prosecution and incarceration on Vusi, and expressed a lot of confidence in the SAYStOP programme. The reformers also wanted Vusi to undergo a specialist programme.

Although practitioners appear to be convinced by the suitability of diversion for child sex offenders, the opposite is the case for the members of the Department of Justice Portfolio Committee (PMG, 2003o). It was the concern that some children (children like Vusi, presumably) would be diverted and then receive an intervention programme of only ten two-hour sessions that has caused the committee to make the greatest changes to the regime envisaged in the early drafts of the Bill (PMG, 2003c; 2003d; 2003e; 2003o). It is in this debate that the weaknesses of the discourses that influence the Bill become apparent. The committee was not convinced that it was necessary to divert such offenders to promote their rights, nor that the public would be protected by either the restorative or rehabilitative options on offer. The Committee now appears to be considering making rape divertible in some cases, but the details of this will not be clear until the final draft of the Bill is published. What is clear, however, is that there will need to be a more robust defence of the principle and practice of diverting child sex offenders if those who are deemed high risk are to be diverted. The promoters of the Bill are now becoming increasingly pessimistic about the effect that it will have on services for child sex offenders; for example Ehlers (2004) suggests that the latest draft goes against the original spirit and intention of the legislation that the decision to divert should be based on a whole range of factors, not just the offence.

It would be a serious blow to those who had advocated and campaigned for the Bill if this group of child sex offenders, which had been in their minds when the Bill was devised, was excluded from its final regime.

Suggestions for Future Developments: Absent Discourses

There are a number of discourses that are commonplace in discussions of child justice in other jurisdictions but were largely, or completely, absent in the early discussions of the Bill. These were discussed in the literature review but not in the data analysis as they did not feature in the responses of the practitioners. In this section, risk, and effective practice will be considered, to determine whether they might be of some assistance in providing a rationale for including high-risk children within the regime of the Bill.

Risk

None of the respondents referred to risk, either in terms of assessing it or managing it. Risk assessment or management did not feature in the submissions to the Portfolio Committee, nor in any of its deliberations. The risk discourse has become dominant in criminal justice practice in the United Kingdom since the 1990s (Kemshall, 2003). It is popular with policy makers and those training probation officers, but it is not without its critics: the focus on risk has been described as creating an illusion of a scientific approach (Shaw and Hannah-Moffat, 2004) and of emphasising bureaucratic, managerialist goals at the expense of real work with child offenders (Goldson, 2000).

Nevertheless, the great benefit of the risk discourse is that it allows a justification to be made for working with serious or persistent child offenders in the community (Moore, 2004). If the risk that such children pose can be accurately assessed then it will be possible to plan measures for managing and addressing that risk. Risk assessment can be done clinically and/ or actuarially, and the risk assessment can assess either or both of the risk of reoffending and the risk of harm. A formal risk assessment framework,

followed by practitioners, would have encouraged the diversion of Zanele and Sipho, as it would have highlighted the relatively minor nature of the threat that they posed, rather than the conflation of dangerousness and persistence (Kemshall, 2003) that was evident in some responses and led to them being treated harshly. It would also have emphasised the need to proceed with caution in Vusi's case, and to put measures in place to protect his sister, and other potential victims. If practitioners can show that child sex offenders are being accurately assessed and being effectively managed in the community then it will be easier for them to convince legislators and policy makers that these children should be diverted.

Practitioners who are being trained for the implementation of the Bill are not being trained in the assessment of risk. If training on risk could be associated with training on the Bill, then a risk assessment and management approach could be introduced as the Bill is introduced. It will also be important for the voices of probation officers to become louder in the debate regarding the Bill: at the moment the dominant voice is that of legally trained academics, and their determined advocacy for the Bill also needs to be supported by practitioners explaining convincingly how they will work with children who are diverted.

Effective Practice

Another omission both from the responses to the questionnaire and from the literature advocating for the Bill is a discussion of effective practice. The respondents expressed faith in diversion, in all cases except Sipho's. This optimism was sometimes based on a confidence in the programme, particularly SAYStOP or a Family Group Conference, but was more likely to be based on some of the personal characteristics of the children themselves. Although some practitioners believed that a particular programme could make the difference between a child offending or not offending, the attitudes expressed by others were more reminiscent of labelling theorists who believed that interventions were at best neutral and at worst harmful, and that practitioners should err on the side of doing little or nothing (Schur, 1973).

The effective practice discourse is, like risk assessment, dominant in discussions of criminal justice interventions in other jurisdictions (Mair, 2004) but rarely heard of in South Africa. It is not without controversy, and the zeal with which it has been embraced in the UK for both adults and young offenders has been much criticised (Goldson, 2004; Kendall, 2004; Mair, 2004). However, a discussion of effective practice would be of benefit to South African child justice in that it also allows a case to be made for work to be done with persistent or serious offenders. Not only does effective practice allow such work, it actively encourages it, in that it relies on research that shows that some high risk offenders should be targeted for community-based interventions (McGuire and Priestley, 1995; Chapman and Hough, 1998; Bonta, 2004; Moore, 2004). Applying aspects of such research to South Africa, in the understanding that research carried out in one society should not be uncritically translated to another very different society (Rashid, 2000; Worrall, 2004), would also encourage service providers to target resources at high risk children, rather than just first time offenders.

As Smith, R. (2003) points out, effective work was being done in the UK before ‘effective practice’ was introduced, and that may also be true in South Africa. The diversion programmes that are currently being run may be effective, and at least some of the children who undergo them may be being prevented from going on to commit serious crime. However, as the Department of Justice Portfolio Committee’s response to SAYStOP shows (PMG, 2003c; 2003d; 2003e), the advocates of such an approach are struggling to convince others of their effectiveness in working with serious offenders and thus need to ensure that their arguments can be supported by research evidence.

Conclusion

The aim of this research was to answer the question of how the processes of diversion from prosecution for children would be affected by the new regime created by the South African Child Justice Bill. This was done through reviewing the literature and

investigating the decisions that would be made by practitioners who would be responsible for making decisions and recommendations at the preliminary inquiry stage.

This research suggests that the Bill will result in improvements to the treatment of many children who are dealt with by the criminal justice system, particularly younger, first-time, minor offenders who will be diverted. Under the previous regime, too many of those children were being prosecuted, or even incarcerated, and this research, in both the fieldwork and the literature review, shows that there is a great commitment on the part of reformers and practitioners to changing the treatment of such children.

However, it does not seem likely that all children will receive the benefit of the new regime: policy makers are reluctant to divert serious offenders and practitioners have doubts about diverting repeat offenders. The lack of programmes developed for these groups of children suggests that many might find themselves treated in a similar way to that in which they are currently being treated.

South Africa remains in a transitional state, and there are many pressing demands competing for the attention of policy makers. In light of this, that the Child Justice Bill has taken so long to enact, and that some of its original ambitious objectives have been compromised, should perhaps not be a surprise. However, this research shows that the Bill will achieve a lot, but may not succeed in transforming the experience of the criminal justice system for every child who becomes involved in it. It appears that if children who offend are to be responded to in an appropriate way that child justice reformers will need to continue to campaign with force and commitment.

APPENDIX A: COVER LETTER AND QUESTIONNAIRE

Postal address.

Date:

Dear Sir or Madam,

I enclose a research questionnaire and I would be very grateful if you would take the time to complete it and return it to me in the stamped addressed envelope provided.

The purpose of the research is to anticipate the implementation of the Child Justice Bill that is expected to be enacted in 2002 or 2003. One of the most significant new provisions in the Bill is the introduction of a preliminary inquiry that should facilitate the diversion of some young people away from the criminal justice system. This research is aimed at discovering the attitudes of the three main role players in the decision to divert: probation officers, prosecutors and magistrates.

The Child Justice Bill is aimed at reforming the South African child justice system to make it more child centred and more in line with international instruments. My research will help to determine whether those objectives are likely to be achieved.

Guidelines as to how to complete the questionnaire are contained on the first page. I would like to emphasise, however, that I do not need to know your name, all information will be kept confidential and no identifying details will appear in the final thesis.

Thank you for taking the time to complete the questionnaire. Please return it in the stamped addressed envelope provided before _____. If you have any questions or comments about the questionnaire or my research project please do not hesitate to contact me by phone or by email,

Yours faithfully,

Brian Stout

Email address

Section One Personal Information

I do not need to know your name, although it will be important for me in analysing the data that you provide some personal information and some information about your work. All this information will be kept confidential and no identifying details will appear in the final research thesis.

Are you male or female?

What nationality are you?

What is your race/ethnicity? Please circle one, or if you prefer to be identified in a different way, please use the space provided.

Black/ African

Coloured

Indian/ Asian

White

Other (please specify)

What is your job title?

What agency do you work for?

How long have you worked for that agency?

What geographical region do you work in?

Please circle the description that you feel most accurately describes the area where you work:

Urban

Rural

Mixture of urban and rural

What percentage of your total work time is spent in working with young people who are in trouble with the law? Please circle one answer that most accurately reflects your workload.

100%

between 75 – 100%

between 50 – 75%

between 25 – 50%

less than 25%

What date you did you complete this questionnaire?

Section Two The Child Justice Bill

How prepared would you say that you are for the introduction of the Child Justice Bill? Please circle one:

Very Well Prepared Prepared Partially Prepared Unprepared Very Unprepared

What preparation have you received? Please specify.

To the reformers only: What has been your involvement in the drafting of the Child Justice Bill and/or the campaign to have it implemented? Please specify.

One of the principles that the Child Justice Bill is based on is that some young offenders should be diverted away from the criminal justice system. Do you agree with this principle?

Strongly Agree Agree Neither Agree nor disagree Disagree Strongly Disagree

Please explain your answer.

The Child Justice Bill provides a number of diversion options; some of these are listed below. Please indicate which of these are available to young people in the area where you work:

Diversion Option	Available	Not Available
Oral or written apology		
Formal Caution		
Attendance centre order		
Community service order		
Victim reparation order		
Compensation order (either to direct victim, or to the community)		
Family Group Conference		
Victim – Offender Mediation		
Other restorative justice processes		
Supervision order		
Reporting order		
Compulsory school attendance order		
Family time order		
Positive peer association order		
Good behaviour order		

Diversion Option	Available	Not Available
Counselling or therapy order		
Residential order		
Order prohibiting child from visiting specified place		

Are there any other diversion options, not mentioned in that list, that you are aware of? If so, please describe them.

Section Three Case Vignettes

Sipho

Personal Details: Sipho is a fifteen year old young black man who lives in a large township just outside a major South African city. During his early years Sipho lived with both his parents and his siblings. He was subjected to physical abuse from his father, who was a heavy drinker, and Sipho frequently ran away from home. Shortly after his twelfth birthday Sipho left home, since then he has stayed with various relatives, always for short periods, and has often lived on the streets. Six months ago Sipho's mother contacted him to say that his father had now left home for good. Sipho accepted his mother's invitation to return home, and that arrangement seemed stable. Sipho has not attended school for over three years and he is functionally illiterate. He says that he would like to return to school so that he can learn to read and write.

Previous Offending: Sipho has been getting into trouble with the law for many years. A previous report on him by a Social Worker states that he had been well known to the local police even before he reached the age of criminal responsibility; he had been reported to them for truancy from school, running away from home and stealing from the local spaza shop.

A court has convicted Sipho on six previous occasions, involving a total of over thirty offences. All his offending has involved theft from various outlets. He says that he normally sells the goods that he steals to adults in his community.

Although Sipho admits that he has committed many more offences than he has ever been prosecuted for he says that his offending has decreased recently.

Previous disposals: A number of different approaches have been taken with Sipho. The first time he appeared in court, aged 13 he was diverted to attend a lifeskills programme, run by an NGO. Sipho completed this programme, but more detailed records about his participation are not available. In 2001 Sipho participated in a victim-offender conference. He apologised to a shopkeeper whose shop he had stolen from. Sipho promised to pay restitution to the shopkeeper but did not do that.

Prior to Sipho's most recent sentence he spent time in adult prison on remand. The Magistrate, who told him that she would send him to custody if he ever appeared before her again, sentenced Sipho to correctional supervision. Sipho's attendance at appointments with his social worker has been good, but he was still subject to supervision when he committed the most recent offence. The period of supervision has since ended.

Current Offence: Sipho was with a group of friends who stole some compact discs from a music store. They were spotted by a security guard who only recognised Sipho and he was subsequently arrested. All the other young people evaded detection. Sipho is pleading guilty and admits playing a part in the offence, but says that it was his friends who actually took the CDs and he did not sell them, nor did he profit from the offence. Sipho says that he was affected by his previous experience of a victim-offender conference and he would like the opportunity to apologise to the owner of the music store.

Vusi

Personal Details: Vusi is a fourteen-year-old boy who lives in a small rural village. He lives with both his parents and his younger sister. He attends the local school. Vusi has a good school record, he passes most of his exams, and his teacher says if he works hard he should have a bright future. He rarely presents any disciplinary problems at home or at school, indeed he seems to be a quiet and shy young person. His parents were shocked at the offence that he committed. They blame his friends for introducing him to alcohol, and have forbidden him from continuing to associate with them.

Previous Offending and Previous Disposals: Vusi has never been in trouble with the police before.

Current Offence: Vusi sexually assaulted his sister, Pumla. Pumla is eleven years old and she alleged that one evening when their parents were away, visiting relative, Vusi came home after being out drinking with his friends and raped her. Vusi admits that he was drunk and that he sexually assaulted his sister but he denies raping her. He will not specify exactly what happened, but he is adamant that it was not rape. He says that he is very sorry for what he has done, and he blames it on the effects of alcohol, he had never been drunk before and he was not sure what he was doing.

Peter

Personal Details: Peter is a sixteen-year-old young white man who lives with his parents and his two younger sisters in a private house in an affluent urban suburb. He attends a private boarding school, some distance from the family home, but returns home to visit every two or three weeks. Prior to his involvement in this offence, Peter's teachers described him as a 'model pupil'. He gained good marks in all classes and showed a particular aptitude for maths and science subjects. He is also a keen sportsperson, and has represented the school at both rugby and athletics.

Peter's parents are keen that his involvement in this offence will not hurt his future. They want him to finish school, go to University and then find work overseas. Peter's father has offered to financially compensate the victims of the offence for the financial loss that they have suffered.

Previous Offending and Previous Disposals: Peter has never been in trouble with the police before.

Current Offence: Peter stole a Mercedes convertible belonging to the parents of one of his friends. He took the keys when he was visiting his friend during the day, and returned in the evening to steal the car. Peter drove the car around the local area until he misjudged a corner and rolled it down an embankment. He escaped with cuts and bruises, and did not return until the following day, over 12 hours after the accident. The car was written off, but the insurance company will not pay out as it assessed the owner as having been negligent with his keys. Peter admitted the offence, but would not state whether anyone had been with him, or if he had been drinking before he drove the car. He said that he had committed the offence because he had always wanted to drive a Mercedes.

Zanele

Personal Details: Zanele is a fourteen-year-old girl who lives with her mother and her twelve-year-old sister. She has never known her father; he left home shortly after his second daughter was born. Zanele attends the local school, but the school describes her as a troublesome pupil who they are considering expelling. The school reports problems both with Zanele's attendance and her behaviour. Her teacher reports that Zanele attends school only two or three days each week, she seems to spend the rest of the time walking around the streets with her friends. When at school, Zanele is rude to teachers and disruptive in class. Zanele's mother admits that she has little control over her daughter and is often not sure where she is.

Previous Offending and Previous Disposal: Zanele has committed one previous offence, an assault in similar circumstances to the offence she is currently charged with. She hit another girl at school after an argument between them. The victim of that assault suffered cuts and bruises and the victim's mother informed the police. Zanele was dealt with by way of a formal caution.

Current Offence: Zanele assaulted another fourteen-year-old girl, Thandi, after an argument between them. Zanele hit and scratched Thandi causing her to suffer bruising on her face and on her arms. Zanele freely admits committing the assault and explains her actions by saying that the victim had previously been her friend but they had argued after Zanele had seen Thandi with Zanele's boyfriend. Zanele says she is not sorry for her actions, she would not consider apologising to the victim and that she would act the same way if the same circumstances arose again.

1. If this child came to your attention how likely would you be to recommend him/ her for diversion?

Very appropriate appropriate unsure inappropriate very inappropriate

Please explain your decision.

2. Which one fact about this child had the greatest influence on your decision?

previous record current offence attitude personal circumstances other

Please explain your answer.

3. If you decided to recommend this child for diversion what option would you want him/her diverted to?

(Please refer to the list of diversion options provided in Section Two. If you choose an option that is available at more than one level please specify how long you would like the young person to undertake the diversion programme.)

4. Is there an option that you would like to divert this child to that is not available in your area? If so, please specify.

5. If this child was diverted away from the criminal justice system, to the option that you suggest, how optimistic would you be that s/he would not reoffend?

Please explain your answer.

Very optimistic optimistic unsure pessimistic very pessimistic

6. If this child was sentenced to custody how optimistic would you be that s/he would not reoffend?

Very optimistic optimistic unsure pessimistic very pessimistic

Please explain your answer.

7. There are three main agencies involved in the decision to divert young people from the criminal justice system. How likely do you think it would be that representatives of the other two agencies would agree with your decision regarding this child? Please explain your answers.

Probation

<i>Very likely To agree</i>	<i>likely to agree</i>	<i>unsure</i>	<i>unlikely to agree</i>	<i>very unlikely to agree</i>
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The Prosecutor

<i>Very likely To agree</i>	<i>likely to agree</i>	<i>unsure</i>	<i>unlikely to agree</i>	<i>very unlikely to agree</i>
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The Magistrate

<i>Very likely To agree</i>	<i>likely to agree</i>	<i>unsure</i>	<i>unlikely to agree</i>	<i>very unlikely to agree</i>
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8. Would your decision about whether or not to recommend this child for diversion be affected by what you thought another agency might recommend? Please explain your answer.

9. Please add any further details that you feel are relevant about this child and the diversion decision that you would make.

APPENDIX B – QUESTIONNAIRE RESPONDENTS

No.	Job Title	Geographical Region and Description	Race	Gender	Experience	Children's work (%)	Type
1	Probation Officer	East London, urban & rural	Black/ African	Female	16 months	50 - 75	Postal
2	Probation Officer	Eastern Cape, urban & rural	Black/ African	Male	16 months	75 - 100	Postal
3	Magistrate	Eastern Cape, urban	Black/ African	Male	15 years	25 – 30	Postal
4	Probation Officer	Eastern Cape, rural	Black/ African	Male	6 years	50 – 75	Postal
5	Prosecutor	Eastern Cape, urban	Coloured	Female	10 months	100	Group interview
6	Magistrate	Eastern Cape, urban	White	Male	24 years	100	
7	Probation Officer	Eastern Cape, urban	Coloured	Female	6 years	100	
8	Probation Officer	Eastern Cape, urban	White	Male	4 and a half years	100	Postal
9	Prosecutor	Eastern Cape, urban & rural	Black/ African	Female	2 years	Less than 25	Delivered & collected
10	Prosecutor	Eastern Cape, urban & rural	Coloured	Female	5 years	50 - 75	Delivered & collected
11	Probation Officer	Eastern Cape, rural	Black/ African	Female	Nine months	50 - 75	Postal
12	Prosecutor	Eastern Cape, urban & rural	Black/ African	Male	19 years	25 - 50	Postal
13	Prosecutor	Eastern Cape, urban	Indian	Female	-	A minority	Individual interview
14	Assistant Probation Officer	Eastern Cape, urban & rural	Black/ African	Male	9 months	100	Group interview
15	Probation Officer	Eastern Cape, urban & rural	Black/ African	Female	1 year	25 – 50	
16	Probation Officer	Eastern Cape, urban & rural	Black/ African	Female	-	-	
17	Probation Officer	Eastern Cape, urban & rural	Black/ African	Female	-	-	
18	Prosecutor	Eastern Cape, urban	White	Female	8 years	25 – 50	Postal

19	Probation Officer	Eastern Cape, urban	White	Female	14 years	Less than 25	Postal
20	Probation Officer	Eastern Cape, rural	Black/African	Male	5 years	Less than 25	Postal
21	Probation officer	Eastern Cape, urban & rural	-	-	-	100	Postal
22	Probation officer	Eastern Cape, rural	Black/African	Female	1 year 8 months	100	Postal
23	Probation Officer	Eastern Cape, rural	Black/African	Male	1 year 9 months	50 - 75	Postal
24	Probation Officer	Eastern Cape, urban & rural	Black/African	Female	1 and a half years	75 - 100	Postal
25	Prosecutor	Eastern Cape, urban & rural	Black/African	Female	12 years	Less than 25	Postal
26	Prosecutor	Eastern Cape, urban & rural	Indian/Asian	Male	6 years	25 - 50	Postal
27	Prosecutor	Eastern Cape, urban & rural	White	Male	75 months	25 - 50	Postal
28	Prosecutor	Eastern Cape, rural	White	Female	9 years	Less than 25	Postal
29	Magistrate	Eastern Cape, rural	White	Male	21 years	50 - 75	Postal
30	Prosecutor	Eastern Cape, urban & rural	White	Male	10 years	25 - 50	Postal
31	Magistrate	Eastern Cape, urban & rural	Black/African	Male	-	25 - 50	Postal
32	Probation Officer	Cape Town, urban	Indian/Asian	Female	11 years	75 - 100	Group interview
33	Probation Officer	Cape Town, urban	Coloured	Female	5 years	75 - 100	
34	Probation officer	Cape Town, urban & rural	Coloured	Female	14 months	75 - 100	
35	Probation officer	Cape Town, urban	Coloured	Female	5 years	100	Group interview
36	Probation officer	Cape Town, urban	Coloured	Female	10 years	100	
37	Probation officer	Cape Town, urban	Black/African	Female	3 years	100	Individual interview
38	Probation officer	Cape Town, urban	Black/African	Female	5 years	100	Group interview
39	Probation Officer	Cape Town, urban	Black/African	Male	3 years	100	
40	Probation Officer	Cape Town, urban	White	Male	17 years	75 - 100	Postal
41	Prosecutor	Cape Town, urban & rural	White	Female	1 year	100	Individual interview

42	Magistrate	Cape Town, urban	White	Female	12 years	100	Individual interview
43	Probation officer	Cape Town, urban	White	Female	10 years	100	Postal
44	Probation officer	Cape Town, urban	White	Female	14 years	50 - 75	Postal
45	Prosecutor	Cape Town, urban	Indian/Asian	Female	3 years	75 – 100	Individual interview
46	Prosecutor	Cape Town, urban	Coloured	Female	1 month	100	Individual interview
47	Prosecutor	Cape Town, urban	Black/African	-	-	100	Delivered & collected
48	Probation Officer	Cape Town, urban	Coloured	Female	1 year	50 - 75	Group interview
49	Probation officer	Cape Town, urban	Coloured	Female	1 year	50 – 75	
50	Magistrate	Cape Town, urban	White	Male	18 years	Less than 25	Postal
51	Probation officer	Cape Town, urban	Coloured	Female	4 years	75 - 100	Delivered & collected
52	Probation officer	Cape Town, urban	Coloured	Female	19 years	75 - 100	Delivered & collected
53	Magistrate	Cape Town, urban	Black/African	Female	3 months	75 - 100	Individual interview
54	Prosecutor	Cape Town, urban	White	Female	-	0 - 25	Individual Interview
55	Magistrate	Cape Town, urban	White	Female	-	75 - 100	Individual Interview
56	Magistrate	Western Cape, rural	-	Male	17 years	25 – 50	Postal
57	Prosecutor	Western Cape, rural	Coloured	Female	1 year	75 - 100	Postal
58	Probation officer	Western Cape, rural	-	-	-	100	Postal
59	Prosecutor	Western Cape, urban & rural	Coloured	Female	3 years	25 – 50	Postal
60	Prosecutor	Western Cape, rural	Coloured	Female	4 years	50 – 75	Postal
61	Prosecutor	Western Cape, rural	Coloured	Female	10 years	25 - 50	Postal
62	Children's Court Magistrate	Cape Town, urban	White	Female	-	100	Individual interview

63	Project Manager	Cape Town, urban	White	Female	6 years	100	Electronic
64	UN project co-ordinator	Gauteng, national responsibility	White	Female	3 years	100	Electronic
65	Senior Researcher/Project Co-ordinator	Cape Town (national responsibility)	White	Female	2 years	50 - 75	Individual interview
66	NGO Deputy Director	Cape Town (national responsibility)	White	Male	10 years	Less than 25	Individual interview
67	Senior Academic	Cape Town (national responsibility)	White	Female	11 years	75 - 100	Individual interview

GLOSSARY AND ACRONYMS

African National Congress (ANC)

The ANC was the primary liberation movement during apartheid, and become the governing party in 1994 following South Africa's first democratic elections (Burger, 2003).

Apartheid

Apartheid is an Afrikaans word meaning 'separation' or 'apartness'. It refers to the system of racial segregation that existed in South Africa between 1948 and 1990 (Burger, 2003).

Diversion levels one, two and three

The Bill provides for three levels of diversion, depending on the seriousness of the offence. Level one orders are the least demanding and include apologies and formal cautions. Level two orders include all level one orders, but for a longer duration, and additional restorative justice interventions. Level three orders include orders of six months or more, with a possible residential element, and are for serious or repeat offending (Wood, 2003).

Dominus litis

A Latin legal phrase that translates as 'principal litigator'.

Intersectoral Committee for Child Justice (ICCJ)

The Intersectoral Committee for Child Justice is an intersectoral forum convened by the Directorate of Children and Youth Affairs within the Department of Justice and Constitutional Development (ICCJ, 2002). The Committee is responsible for ensuring that planning for the implementation of the Bill is co-ordinated across government departments. Represented on the committee are: The Department of Justice and Constitutional Development; National Prosecuting Authority; Department of Social Development; Department of Correctional Services; Department of Education; The South African Police Service and The Office of the Rights of the Child, the Presidency (ICCJ, 2002).

NGO

Non-governmental Organisation.

NICRO

The National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) is described in detail in chapter two.

Parliamentary Monitoring Group (PMG)

The Parliamentary Monitoring Group, an information service, was established in 1995 as a partnership between human rights organisations Black Sash, Human Rights Committee and the Institute for Democracy in South Africa (Idasa). The aim of the group was to provide a record of the proceedings of the more than forty South African Parliamentary Committees. This was because there is no official record of the committee proceedings, and the information is needed by researchers and by civil society. The website was set up at the beginning of 1998 to make the information generated available to a wider audience and is currently the only source for this type of information (PMG, 2004i).

Place of Safety

A place of safety is any suitable place for the temporary care of a child until the outcome of a children's court inquiry. It must be registered with the Minister of Social Development. Children's homes are commonly used as places of safety, but the definition is broad and even a private individual can be designated as a place of safety for a child (Skelton, 1998). Bonnytoun and Horizons are places of safety referred to by the participants in this research.

Pollsmoor

Pollsmoor Prison is a maximum security prison. It is located in the suburb of Tokai in the Valley of the Constantiaberg about 25 km from Cape Town. It is most widely known for having housed Nelson Mandela, in the 1980s. It contains five prisons, one of which houses both awaiting trial and sentenced children and young people between the ages of 14 and 21. The female prison houses both children and adults (Centre for Conflict Resolution, 2004).

Referral Orders

The referral order was introduced in the UK by the Youth Justice and Criminal Evidence Act 1999. Young people pleading guilty on their first court appearance are referred to a youth panel so that their offences can be dealt with outside the justice framework. The order was introduced with the aim of applying restorative justice principles within the youth offending context (Smith, R., 2003).

Reform School

Reform Schools are compulsory residential facilities offering academic and technical education, managed by the Department of Education. There are 19 reform schools in South Africa: one is in Mpumalanga Province, and the other eighteen are in the Western Cape, leaving seven provinces without such facilities (Gallinetti, 2003a). The Department of Education is undergoing a process of transforming these facilities into Youth Care and Education Centres (Gallinetti, 2003a) but, at present, the national shortage of reform school provision is a serious problem (PMG, 2004h).

SAYStOP

The South African Young Sex Offenders Programme (SAYStOP) is described in detail in chapter two.

Schedule One, Two and Three Offences

Schedule one offences include minor assaults, acts of criminal damage and theft of property up to the value of R500. Schedule two offences include more serious assaults, thefts and robberies. Schedule three offences are the most serious and include murder, rape and drug trafficking. Full details are provided in the Bill itself.

Sjambok

The sjambok is the traditional whip of South Africa. It is made from an adult hippopotamus (or rhinoceros) hide. A section of the animal's hide is cut and carved into a strip. This strip is then rolled until reaching a near circular form. The resulting whip is both flexible and tough. A plastic version was made for the South African Police Service, and used for riot control (Wikipedia, 2004).

Spaza shop

A spaza shop is a traditional name given to a general grocery store, usually situated in a rural area, or a township.

Takkies

A slang word for rubber-soled training shoes.

The 28s

The 28s, along with the 26s, is one of the two most powerful prison gangs in South Africa. The original 28 gang had its origins in the mines, but it is now based in the prisons (Goyer, 2001).

Ubuntu

The concept of *ubuntu* as it relates to the Bill is discussed by Mbambo and Skelton (2003). They quote from Archbishop Desmond Tutu (1999a: 34), writing about the Truth and Reconciliation Commission for an international readership and his definition is the most appropriate:

Ubuntu is very difficult to render into a Western language. It speaks of the very essence of being human. When we want to give high praise to someone we say 'yu, u nobuntu'; 'hey, he or she has ubuntu'. This means they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up in theirs. We belong to a bundle of life. We say 'a person is a person through other people.'

Boraine (2000) suggests that *ubuntu* has given the South African legal system three concrete principles: communitarianism and the primacy of the group over the individual; the need for conciliatory processes rather than adversarial ones; and the individual's duties to the larger group.

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